

ATTACHMENT 1

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2
3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEW MEXICO**

5 QWEST CORPORATION,

6 Plaintiff,

7 v.

8 ELEPHANT BUTTE IRRIGATION
9 DISTRICT,

10 Defendant.

Case No.CV07-163 MV/WDS

11
12 **DECLARATION OF WILLIAM FITZSIMMONS**
13 **IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

14 I, William Fitzsimmons, declare as follows:

15 1. I am an independent economic expert with a concentration in the analysis of
16 economic issues related to telecommunications. My business address is 352 Olive Avenue,
17 Piedmont, CA 94611. Qwest Corporation ("Qwest") retained me in this case to serve as an
18 expert witness. This declaration is based on my expert opinions.

19 2. I have a Ph.D. in Resource Economics from the University of Massachusetts at
20 Amherst and two decades of experience analyzing telecommunications issues. With respect to
21 telecommunications issues, I have developed models of competitive entry into local service
22 markets, advised telecommunications companies on the construction of forward-looking cost
23 models, assessed the impacts of changing policies and practices on telecommunications firms
24 and the development of competition, and analyzed conditions facing telecommunications carriers
25 for accessing public rights-of-way. With respect to rights-of-way usage and costs, I am familiar
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1 with the rights-of-way management costs of, and the fees imposed by, a number of
2 municipalities. I also have extensive experience with the analysis of economic issues related to
3 the implementation of the Telecommunications Act of 1996 ("Telecom Act"), including the
4 safeguard central to the issue at hand found in Section 253, which is titled "Removal of Barriers
5 to Entry." I have testified in numerous proceedings on cost models and economic policy issues.
6 Before I became an independent economic expert, I worked for approximately 14 years with
7 LECG, an economic consulting firm. My curriculum vitae is attached as Appendix A.

9 3. I was asked by Qwest to provide my expert opinion related to: (1) the potential
10 prohibitory effect of Elephant Butte Irrigation District's ("EBID") 2005 and 2007 Fee Schedules;
11 and (2) whether these fees are fair and reasonable.

12 4. As is described below, from a financial perspective, the increases in EBID's land
13 use fees may effectively preclude a firm from undertaking investments and offering the
14 associated services. This is the essence of effective prohibition, which is an issue identified in
15 Section 253 of the Telecom Act. Furthermore, the increases in EBID's land use fees are neither
16 fair nor reasonable. EBID does not provide any cost basis for the large increases in its land use
17 fees or even claim that there is a cost basis for these increases. In an attempt to establish that its
18 fees are reasonable, EBID cites a wide range of fees charged by other regional entities, but (as I
19 describe below) simply listing fees, without demonstrating that any of the fees are themselves
20 fair and reasonable or related to rights-of-way that are comparable to EBID's rights-of-way, falls
21 far short of establishing that the large increases in EBID's land use fees are anything other than
22 arbitrary. In the final analysis, EBID's fee increases are unconstrained by any limiting standard
23 that is rationally related to the costs that it incurs or the economic goals of the Telecom Act.
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I. 2005 FEE SCHEDULE

5. As shown in Figure 1, the 2005 Fee Schedule more than tripled EBID's land use fee for crossings and increased its land use fee for parallel permits by 2,400 percent.

Figure 1
Change in EBID Land Use Fees under 2005 Fee Schedule

	Land Use Fees (\$/linear foot)			% Increase
	Old Rate	New Rate	Increase	
Crossing	\$0.15	\$0.50	\$0.35	233%
Parallel	\$0.01	\$0.25	\$0.24	2400%
Source: EBID Permit/License Fee Schedule, Board Approved "Proposed" Fees on October 12, 2005 (QC 000111).				

6. The following four examples are Qwest projects that require the use of EBID's rights-of-way. These examples demonstrate that the increases in the EBID land use fees under the 2005 Fee Schedule correspond to large dollar increases in the rights-of-way costs for a telecommunications competitor such as Qwest.

Figure 2
Dollar Impacts of the 2005 Fee Schedule

Project	Land Use Distance (ft)	Construction Costs	Land Use Fees			Rate / Construction Costs	
			Old Rate	New Rate	New/Old	Old	New
1	50	\$936	\$569	\$1,896	3.3	0.6	2.0
2	986	\$7,811	\$1,279	\$19,640	15.4	0.2	2.5
3	3,009	n/a	\$1,141	\$28,522	25.0	n/a	n/a
4	1,737	\$17,294	\$1,139	\$28,472	25.0	0.1	1.6
Sources: Qwest Internal Information; and EBID Permit/License Fee Schedule, Board Approved "Proposed" Fees on October 12, 2005 (QC 000111).							

7. The first project requires 50 feet of right-of-way across an EBID lateral. As shown, the change in the EBID fee schedule more than triples the land use fee for this 25 year

1 permit, increasing it from \$569 to \$1,896. Using the old rate of \$0.15 per linear foot of crossing,
2 the land use fee would have been slightly more than one-half (0.6) of Qwest's construction costs.
3 With the new rate of \$0.50 per linear foot, the land use cost for Qwest is approximately double
4 (2.0) the cost of constructing the facilities.
5

6 8. The second project requires 50 feet of right-of-way crossing an EBID lateral and
7 936 feet of right-of-way parallel to a second EBID lateral. As shown, the land use fee for this
8 project with the new rates is \$19,640, more than 15 times the fee of \$1,279 calculated with the
9 old rates. Using the old rates, the land use fee would have been less than 20 percent of Qwest's
10 construction costs. With the new rates, the land use fee for Qwest is two and one-half times the
11 construction cost. Both in terms of absolute dollar increases and relative to the capital costs
12 associated with these projects, the increases in the EBID land use fees in these examples are
13 substantial.
14

15 9. The third and fourth projects are for parallel rights-of-way. There is no
16 construction cost associated with the third project because this is a renewal of an existing permit,
17 but with a new land use fee that is 25 times higher than what it would have been with the old
18 land use rates. The fourth project is for the replacement of aerial cable that runs parallel to an
19 EBID lateral. As shown, the new land use fee is again 25 times higher than it would have been
20 with the old rates, and it swells from one-tenth of the cost of the construction to more than one
21 and one-half times the cost of placing this project's 1,737 feet of 25-pair aerial cable. As I
22 describe below, such large fees for access to EBID rights-of-way can undermine the expected
23 financial performance of an investment to the point that a firm will neither make the investment
24 nor provide the service(s) associated with the investment.
25
26

10. The fact that EBID's fee increases can preclude a firm from the opportunity to earn a positive return on an investment is demonstrated in Figure 3. As shown in Figure 3, Qwest requires a permit for 3,183 feet of parallel rights-of-way, 1,737 feet for the replacement of aerial cable (the fourth project described above) and an additional 1,446 feet for rights-of-way for which Qwest does not have an active permit. The overall impact of the new EBID land use rates is an increase of \$50,087 for the land use fee. It is my understanding that Qwest facilities related to this permit fee increase are used to serve 6 active residential lines. The prohibitory impact of these higher fees is demonstrated by an examination of the impact on the incremental revenue per line that Qwest would need to collect in order to recover this cost increase.

Figure 3
Average Monthly Revenue Required Per Line
To Recover the EBID Land Use Fee

	Land Use Fees		Difference
	Old Rate	New Rate	
Distance (ft)	3,183	3,183	0
Active Lines	6	6	0
Land Use Fee	\$2,087	\$52,174	\$50,087
Land Use Fee/Lines	\$348	\$8,696	\$8,348
Required Revenue/Month/Line	\$3.20	\$80.11	\$76.90
<i>Sources: Qwest Internal Information; and EBID Permit/License Fee Schedule, Board Approved "Proposed" Fees on October 12, 2005 (QC 000111).</i>			

11. As shown, the old rates would have resulted in an annual land use fee of \$348 per line. Using standard cash flow analysis, I estimate Qwest would need to collect an average incremental revenue of \$3.20 a month from each line for the 25 years of the permit to recover

1 this cost.¹ This is not a negligible amount, but it pales beside the revenue required to recover the
2 land use fees under the October 2005 EBID land use policy. The October 2005 rates would have
3 added an additional cost of \$8,348 per line. As shown in Figure 3, Qwest would need to collect
4 approximately \$80 per line per month for the next 25 years just to recover the cost of the EBID
5 land use fee. To put this in perspective, Qwest's average local and total revenues per residential
6 line in New Mexico are \$19.82 and \$30.04 respectively.² It is all but certain that a fee increase
7 that requires a firm to recover an average incremental revenue per line of over \$75 per month for
8 the next 25 years (when average monthly revenue per line is less than half that amount) will
9 preclude the opportunity for the firm to earn a positive financial return from the investments it
10 makes to serve these customers.
11

12 12. The magnitude of the increased fees under the 2005 Fee Schedule can undermine
13 the financial viability of telecommunications investments to the point where there is little or no
14 reasonable expectation of financial success, and this may effectively prohibit Qwest from
15 undertaking investments and offering the associated services. Qwest and other
16 telecommunications providers generally cannot undertake projects that have little or no
17 reasonable prospects for financial success.
18

19 13. It is not reasonable to impose such large cost increases on facilities-based
20 telecommunications providers that use the EBID rights-of-way (and in Qwest's case, have used
21 these rights-of-way for many years) without careful analysis to support the increase. EBID
22 maintains that it recovers the costs that it incurs for managing the use of its rights-of-way in its
23

24
25 ¹ Using a standard cash flow approach, and using the cost of capital adopted by the New Mexico Regulation
26 Commission of 10.72 percent, I estimated the average monthly revenues per active line required over a 25 year
period to create net present values equal to the land use fees shown above.

² Qwest's total revenue includes local, access, toll, and DSL revenues.

1 Administrative Fee.³ Other than a vague reference to “fair market value of the right and
2 privilege requested for the use of the right-of-way...”,⁴ however, I am not aware of any rationale
3 or analysis on behalf of EBID that supported the dramatic increases in its land use fees under the
4 2005 Fee Schedule. As I describe below, except in areas where EBID can demonstrate that there
5 is a scarcity of its rights-of-way suitable for placing facilities, the only market value that these
6 rights-of-way possess is the value extracted by EBID with the exercise of its monopoly power
7 over rights-of-way, and the exercise of monopoly power by a quasi-municipal entity such as
8 EBID is neither fair nor reasonable.

10 14. EBID incurs costs to provide its rights-of-way to utilities, and it is reasonable for
11 EBID to charge prices for access to the rights-of-way based upon these costs. EBID charges an
12 Administrative Fee⁵ to recover its administrative costs, which it describes as “all direct or
13 indirect costs associated with reviewing, issuing, and processing of rights-of-use requests, and
14 the administration of this policy.”⁶ In its Right of Use and License Policy, EBID enumerates
15 these costs as follows:
16

- 17 • Engineering review
- 18 • Legal review
- 19 • Reviews required by federal, state or local agencies
- 20 • Coordination with other agencies
- 21 • Construction inspection
- 22 • Document preparation
- 23 • Rights-of-use assistance
- 24 • Appraisals for right-of-use and right-of-way

23 ³ EBID increased the minimum level of its Administrative Fee from \$300 to \$500. The Administrative Fee
24 includes the minimum fee, overhead of 33 percent, and any excess costs related to the right-to-use permit. *See*
25 Declaration of David R. Goodnight (“Goodnight Decl.”), Ex. A (2005 Fee Schedule) & Ex. B (EBID’s Right of Use
and License Policy).

25 ⁴ *See* Goodnight Decl., Ex. B at 5.

26 ⁵ It is my understanding that Qwest is not challenging the increase in the Administrative Fee.

⁶ *See* Goodnight Decl., Ex. B at 2.

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- 1 • Other applicable charges⁷

2 15. Given that EBID recovers the costs that it incurs with its Administrative Fee, the
3 land use fees under the 2005 Fee Schedule are not based upon costs that EBID incurs. EBID
4 claims that these fees are based upon the fair market value of rights-of-way usage, but this is
5 incorrect. Two considerations make this clear. First, the land use fees in question relate to space
6 beneath the ground and on utility poles. Second, fair market value for an asset depends critically
7 upon economic scarcity. An asset is scarce in an economic sense if at a price of zero the demand
8 for the asset exceeds the supply. On the contrary, if the supply of rights-of-way suitable for
9 placing network facilities would exceed its demand at a price of zero, then it is not scarce in an
10 economic sense, and it has little or no fair market value. Given the amount of space in EBID's
11 rights-of-way and the limited number of entities with demand for this space, it is unlikely that
12 demand for this space would exceed supply at any price, including zero. In fact, EBID's
13 witnesses acknowledged that they were not aware of an instance where Qwest's use of EBID's
14 rights-of-way has interfered with another firm's desire to use space in EBID's rights-of-way.⁸

17 16. Monopoly control over an asset is the one factor that could allow an entity, such
18 as EBID, to command a positive price for a non-scarce asset. This is known as monopolistic
19 pricing, which is the ability of an entity to extract compensation that is significantly above costs
20 (or unrelated to costs) in a situation where there are few or no practical alternatives to discipline
21 such behavior.⁹ Given the lack of a cost basis for EBID's fee increases and the lack of economic
22 scarcity related to its rights-of-way, these increases are an apparent exercise of EBID's
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25 ⁷ See Goodnight Decl., Exs. A & B at 5.

⁸ See Goodnight Decl., Ex. C (Deposition of Henry Magallenz) at 54:21-55:1.

26 ⁹ This is in contrast to competitive pricing, where the availability of practical alternatives limits the ability of an entity to set prices well above costs.

1 monopoly power over rights-of-way suitable for placing network facilities. In the context of the
2 economic goals of the Telecom Act, monopolistic pricing by EBID is neither fair nor reasonable.

3 17. Unless EBID can identify areas where the demand for space suitable for placing
4 Qwest's facilities exceeds supply, or would exceed supply at a price of zero, then the fair market
5 value of using this space is a fiction and the basis for the increases in EBID's land use fees is
6 neither fair nor reasonable. In fact, EBID admitted that it does not know the fair market value of
7 its rights-of-way, and it does not know how its land use fees relate to the fair market value of
8 occupying this space.¹⁰

9
10 18. EBID compounds the conceptual problem (of setting "fair market value based"
11 land use fees for rights-of-way that have no fair market value) with a flawed formula for
12 calculating what it calls the "Total Land Use Fee" under the 2005 Fee Schedule. The formula, in
13 effect, calculates a total land use fee that is equal to the sum of annual payments over the life of
14 the permit, with the annual payments inflated each year by the prime lending rate. As I describe
15 below, this formula improperly inflates the already baseless land use fees by 192 percent for a 25
16 year permit (using an 8 percent prime lending rate).
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26 ¹⁰ See Goodnight Decl., Ex. C (Magallanez Depo) at 76:7-76:14; 77:5-77:12.

Figure 4
Illustration of Flaw in EBID Land Use Formula

Distance of Parallel Rights-Of-Way (ft)	4,000
Land Use Fee (\$/yr/ft)	0.25
Annual Fee	\$1,000
Permit Life (yrs)	25
Prime Lending Rate (used as an inflation rate in the EBID formula)	8%
Annual Payment in Year 25 w/ Inflation	\$6,341
Value in Year 25 of \$1,000 Today w/Inflation	\$6,341
Approx. Upfront Payment Needed to Cover EBID Land Use Fees	\$25,000
Upfront Payment Calculated by the EBID Land Use Fee Formula	\$73,106
Approx. EBID Formula-Related Overcharge	\$48,106
Approx. EBID Formula-Related Overcharge Percent	192%
Source: EBID Permit/License Fee Schedule, Board Approved "Proposed" Fees on October 12, 2005 (QC 000111).	

19. Given the mechanics of its formula, EBID apparently believes that annual payments related to its land use fee should increase each year by the prime lending rate. The illustrative example shown in Figure 4 demonstrates the impact of the EBID formula. In this example, a firm uses 4,000 feet of parallel rights-of-way. According to the new EBID rates, the Base Land Use Fee would be $\$0.25 \times 4,000 = \$1,000$, which is the fee for the first year of the permit. If the prime lending rate is 8 percent, then the annual land use fee would increase to \$1,080 in year two ($\$1,000 \times 1.08 = \$1,080$), to \$1,166 in year three, and so on until year 25, when the annual fee would be \$6,341. The sum of the twenty-five payments calculated in this manner equals \$73,106, which matches exactly the Total Land Use Fee calculated by the EBID formula. As is explained below, the Total Land Use Fee as calculated by EBID is inflated inappropriately by 192 percent.

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20. Due to the time value of money, EBID does not require a payment of \$6,341 today to compensate it for an annual land use fee of \$6,341 in the twenty-fifth year of the permit. This is because \$1,000 invested today at a positive interest rate will be worth considerably more than \$1,000 in twenty-five years. For example, \$1,000 invested today at an annual interest rate of 8 percent will grow to \$6,341 in twenty-five years.¹¹ By ignoring the value of receiving payment today rather than waiting to receive payment in the future, the EBID formula greatly overstates the payment required today for a 5, 10, or 25 year permit.

21. Given the time value of money, the total upfront payment to compensate EBID for the life of the permit should be much closer to \$25,000 than \$73,106. In fact, if EBID can earn the prime lending rate on upfront payments it receives from firms that use its rights-of-way, then a payment of \$25,000 today will compensate EBID for twenty-five annual land use fees that increase each year by the prime lending rate. Even if all of the other flaws in the 2005 Fee schedule were not a problem, ignoring the time value of money in its formula is a serious flaw that can nearly triple the land use fee.

II. 2007 FEE SCHEDULE

22. In August 2007, EBID adopted a new fee schedule. For use of rights-of-way parallel to EBID's facilities, the 2007 Fee Schedule set new per foot charges and adopted a new present value formula for multi-year permits. For use of crossing rights-of-way, the 2007 Fee Schedule replaced its per foot methodology with flat fees and abandoned the use of a present value formula for multi-year permits. The 2007 Fee Schedule, thus, adopted very different methodologies for setting fees for parallel versus crossing permits.

11 Even if there was a market value for the rights-of-way in question, I am not aware of why EBID would assume that the value would increase at a rate that is significantly different from the return that EBID could earn. As shown, $\$1,000 * (1.08)^{24} = \$6,341$.

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23. Figure 5 summarizes the impacts of the 2007 Fee Schedule on the same four projects described above in Figure 2.

Figure 5
Dollar Impacts of the 2005 and 2007 Fee Schedules

Project	Land Use Distance (ft)	Land Use Fees			Aug 2007 / pre-Oct 2005
		Pre-Oct-05	Oct-05	Aug-07	
1	50	\$569	\$1,896	\$2,250	4.0
2	986	\$1,279	\$19,640	\$6,260	4.9
3	3,009	\$1,141	\$28,522	\$12,892	11.3
4	1,737	\$1,139	\$28,472	\$7,442	6.5
<i>Sources: Qwest Internal Information; and EBID Permit/License Fee Schedule, Board Approved "Proposed" Fees on October 12, 2005 (QC 000111) and amended, effective August 21, 2007.</i>					

24. As shown, the land use fee for Project 1 is higher under the August 2007 fee schedule than it was under the October 2005 schedule, and, for all four projects, the fees under the August 2007 Fee Schedule are substantially larger than under the schedule that existed prior to October 12, 2005. Relative to the fees that Qwest would have paid under the fee schedule that was in place prior to October 2005, the August 2007 schedule increases Qwest's fees for these projects by from four (Project 1) to 11.3 times (Project 3).

25. Figure 6 shows the new flat fee schedule for crossing permits. As shown, the flat fee for a crossing of up to 50 feet is \$2,250. Any part of each additional 50 feet increment of crossing rights-of-way adds \$250 to the flat fee charged by EBID under its new fee schedule.

Figure 6
2007 Fee Schedule -- Flat Fees for Crossing Permits

Length of Crossing	Flat Fee	Flat Fee for each Increment of 50 Feet (\$/foot)
1-50	\$2,250	\$45
51-100	\$2,500	\$5
101-150	\$2,750	\$5
151-200	\$3,000	\$5

Source: Fees Adopted by the Board of Directors of EBID, August 21, 2007

26. As shown, per foot fees in the 2007 Fee Schedule for crossing permits drop precipitously as the distance increases beyond 50 feet. For a 50 foot crossing, the flat fee is \$45 per foot ($\$2,250 \div 50 = \45), but for each additional 50 foot increment the fee is \$5 per foot ($\$250 \div 50 = \5). This is out of sync with EBID's claim that its land use fees are based upon the fair market value of its rights-of-way. It is difficult to imagine a situation in which the fair market value for the first 50 feet of rights-of-way is nine times as high as the market value for subsequent 50 foot increments.

27. Figure 7 provides a comparison of crossing fees of different distances for the fee schedules in effect prior to October 2005, October 2005, and August 2007.

Figure 7
Dollar Impacts of the Three Land Use Fee Schedules for Crossings

Length of Crossing Permit (ft)	Pre-October 2005		October 2005		August 2007	
	Total Land Use Fee	Fee Per Foot	Total Land Use Fee	Fee Per Foot	Total Land Use Fee	Fee Per Foot
50	\$569	\$11	\$1,896	\$38	\$2,250	\$45
100	\$1,137	\$11	\$3,792	\$38	\$2,500	\$25
150	\$1,706	\$11	\$5,687	\$38	\$2,750	\$18

Sources: Qwest Internal Information; and EBID Permit/License Fee Schedule, Board Approved "Proposed" Fees on October 12, 2005 (QC 000111) and amended, effective August 21, 2007.

28. As shown, the land use fee for a 50 foot crossing under the August 2007 Fee Schedule is \$2,250. This is, in fact, the new fee for Project 1 described above, because this project requires a 50 foot crossing. As shown, the cost of a 50 foot crossing permit under the August 2007 fee schedule (\$2,250) is approximately four times the fee that EBID would have charged under the fee schedule that existed prior to October 2005.

29. EBID relies on Dr. Reading to support its August 2007 Fee Schedule. He attempts to support the new crossing fees by citing fees charged by three entities that he describes as "comparable," yet he fails to offer any explanation or evidence as to what makes the rights-of-way of these entities comparable with EBID's rights-of-way or demonstrate that any of the three fees that he cites are themselves fair and reasonable. He also fails to provide explanations for: (1) crossing fees that are nine times greater, on a per foot basis, for the first 50 feet than for all subsequent increments of 50 feet; or (2) why it is fair and reasonable to set flat rate fees for crossing permits while calculating fees for parallel permits with a formula that is driven by both an interest rate and the duration of the permit.

1 30. The fees for parallel permits under the 2007 Fee Schedule are also much larger
2 than they were under the fee schedule in effect prior to October 2005. In fact, the per foot fee of
3 \$0.15 under the August 2007 Fee Schedule is 1,400 percent higher than the fee in effect prior to
4 October 2005.

5
6 31. Dr. Reading attempts to support the new parallel fees by citing fees charged by
7 seven regional entities. The fact that Dr. Reading refers to these "fees" as "comparable market
8 rates" suggests that his survey is intended to support the new charge of \$0.15 per linear foot for
9 parallel permits. He does nothing, however, to establish that these fees are for rights-of-way that
10 are comparable with each other or EBID's rights-of-way. In fact, the highest "comparable
11 market rate" in Dr. Reading's survey is 33 times the lowest rate. Suggesting that fees that are so
12 far apart are both reasonable and for comparable rights-of-way strains credulity past the breaking
13 point. Dr. Reading's analysis also ignores the fact that many regional entities do not assess per
14 foot fees for access to their rights-of-way.
15

16 32. Although these are significant flaws, the most serious flaw in Dr. Reading's
17 analysis is that he fails to establish that any of the fees in his survey are fair and reasonable.
18 Rather than support a finding that the EBID fees are cost-based, or otherwise fair and reasonable,
19 the wide range of fees cited by Dr. Reading suggests strongly that a number of the entities cited
20 by Dr. Reading possess significant monopoly power over suitable rights-of-way and are setting
21 rates arbitrarily.
22

23 33. The lack of comparability in Dr. Reading's survey is underscored by his inclusion
24 of the rates that Qwest charges El Paso Electric Company for attaching cables to utility poles.
25 The fee of \$0.15 that he estimates for pole attachments is not comparable to EBID's land use fee,
26

1 which EBID claims is based upon the fair market value for the use of its rights-of-way.
2 Throughout the United States, when telecommunications firms own the poles, they charge pole
3 attachment fees that have a cost basis.¹² This is very different from EBID's land use fees for
4 space in its rights-of-way. EBID does not claim that it incurred or incurs any cost related to the
5 space that Qwest uses that is not already recovered by the \$500 Administrative Fee. If Qwest
6 uses 50 feet of right-of-way parallel to an EBID canal for underground cables, Qwest incurs the
7 cost to dig the trench, purchase and place the conduit, backfill the trench and maintain the space
8 and cables. EBID incurs administrative costs and charges an administrative fee to cover these
9 costs. With no cost basis, EBID also charges for the mere occupation of space in its rights-of-
10 way. There is not even any opportunity cost associated with this space, since the occupation by
11 one network service provider does not interfere with EBID's opportunity to provide space to
12 other firms. Given EBID's own admissions, there is apparently no scarcity of space in the EBID
13 rights-of-way.
14
15

16 34. In addition to unsupported and essentially arbitrary per foot fees for parallel
17 permits under the August 2007 Fee Schedule, the formula used to calculate the fees for multi-
18 year parallel permits remains flawed. As explained above, EBID's land use payment formula
19 under the 2005 Fee Schedule improperly inflated its already baseless land use fees by 192
20 percent for a 25 year permit (using an 8 percent interest rate). In a response to this error, EBID
21 made two changes. It adopted a new land use payment formula, and it decreased the interest rate
22 that drives the formula from 8 percent to 1 percent. With its new formula, EBID continues to
23 compound the conceptual problem (of setting "fair market value based" land use fees for rights-
24

25 ¹² See Federal Communications Commission, "Pole Attachment Enforcement,"
26 <http://www.fcc.gov/eb/mdrd/PoleAtt.html>.

1 of-way that have no fair market value) with a flawed rationale for calculating land use fees for
2 multi-year parallel permits.

3 35. Like the 2005 formula, the 2007 formula calculates a total land use fee that is
4 equal to the sum of annual payments over the life of the permit, with the annual payments
5 inflated each year by an interest rate. Figure 8 presents an example of the application of the new
6 formula for calculating the amount of parallel land use fees. As shown, the application of
7 EBID's new formula inflates the land use fee by 14 percent for a 25 year permit.
8

9 **Figure 8**
10 **Illustration of Flaw in EBID Land Use Formula**

11 Distance of Parallel Rights-Of-Way (ft)	6,667
12 Land Use Fee (\$/yr/ft)	0.15
13 Annual Fee	\$1,000
14 Permit Life (yrs)	25
15 Inflation rate in the EBID formula	-1%
16	
17 Approx. Upfront Payment Needed to Cover EBID Land Use Fees	\$25,000
18 Upfront Payment Calculated by the EBID Land Use Fee Formula	\$28,564
19	
20 Approx. EBID Formula-Related Overcharge	\$3,564
21 Approx. EBID Formula-Related Overcharge Percent	14%
22 <i>Source: Amendment to EBID Permit/License Fee Schedule, Adopted by the Board of</i>	
23 <i>Directors of EBID, August 21, 2007.</i>	

24 36. The formula that EBID adopted is typically used to determine the present value of
25 a constant annuity. For example, consider a city that is scheduled to receive a payment of \$1,000
26 each year for 25 years. Given an expectation that the city can earn 5 percent on its money, what
is this stream of payments worth today? That is, what upfront payment would it trade for this
stream of 25 annual payments? The answer is that the city would be indifferent from a financial
perspective between 25 annual payments of \$1,000 and an upfront payment of \$14,094. Another

1 way of saying this is that a city that invests \$14,094 at an interest rate of 5 percent can withdraw
2 \$1,000 each year for 25 years before the account is exhausted. EBID takes a somewhat unusual
3 approach by assuming a negative interest rate. As shown in Figure 8, the application of the
4 formula with a negative one percent interest rate actually inflates the land use fee.

5
6 37. In effect, the new formula inflates the stream of payments at a compound annual
7 rate of one percent. A problem with the selection of this interest rate is that it is based on the
8 national rate of increase of the real price of farm land. EBID apparently believes that the value
9 of space in its rights-of-way, much of which is below ground, tracks with changes in the real
10 price of farm land nationwide, where farmers grow crops above the ground, but this is
11 unsupported by any form of analysis, reasonable expectation, or common sense. The value of
12 farm land is, presumably, a function of the profitability of the crops that it produces and, in many
13 cases, the receipt of government subsidies. The richness of the soil, shifting crop prices, and the
14 presence of large-scale government subsidies, however, bear no obvious relationship to the value
15 of the space on poles and under the ground where Qwest places its cables.

17 38. Furthermore, farm land is scarce in the economic sense. That is, at a price of
18 zero, the strong expectation is that the demand for a parcel of farm land would exceed supply. It
19 is unlikely that this is true for space in EBID's rights-of-way. Given the amount of space in
20 EBID's rights-of-way and the limited number of entities with demand for this space, it is
21 unlikely that there would be a shortage of space at any price, including a price of zero. In fact,
22 EBID's District Engineer knows of no instances in which Qwest's use of EBID rights-of-way
23 has interfered with another firm's desire to use the rights-of-way.¹³

24
25
26 ¹³ See Goodnight Decl., Ex. C (Magallenz Depo) at 54:21-55:1.

39. Overall, the parallel and crossing fees established in August 2007 may effectively preclude a firm from undertaking an investment and offering the associated services. Figure 9 extends the analysis of the prohibitory effects of EBID's land use fees by including the analysis of the impact of the August 2007 fees on the real world project that was described above in Figure 3.

Figure 9
Average Monthly Revenue Required Per Line
To Recover the EBID Land Use Fee

	Land Use Fees			Aug 07 minus Pre- Oct 2005
	Pre-Oct-05	Oct-05	Aug-07	
Distance (ft)	3,183	3,183	3,183	0
Active Lines	6	6	6	0
Land Use Fee	\$2,087	\$52,174	\$13,638	11,551
Land Use Fee/Lines	\$348	\$8,696	\$2,273	1,925
Required Revenue/Month/Line	\$3.20	\$80.11	\$20.94	\$17.74
<i>Sources: Qwest Internal Information; and EBID Permit/License Fee Schedule, Board Approved "Proposed" Fees on October 12, 2005 (QC 000111) and amended, effective August 21, 2007.</i>				

40. As shown, the land use fee under the August 2007 schedule is 6.5 times higher than the fee under the fee schedule that EBID used prior to October 12, 2005. Qwest will need to collect approximately \$21 per line per month for the next 25 years just to recover the cost of the latest EBID land use fee. To put the new fee in perspective, Qwest's average local and total revenues per residential line in New Mexico are \$19.82 and \$30.04 respectively. It is all but certain that a fee increase that requires a firm to recover an average incremental revenue per line of over \$20 per month for the next 25 years will preclude the opportunity for the firm to earn a positive financial return from the investments it makes to serve these customers. From a


1 financial perspective, this means that the EBID land use fees may effectively preclude a firm
2 from undertaking this investment and offering the associated services.

3
4 **III. CONCLUSION**

5 41. It is instructive to consider the broader implication of the wide range of fees and
6 methodologies that EBID has adopted over the last few years. The most troubling implication is
7 that EBID is setting arbitrary fee schedules in an attempt to increase its revenues without
8 establishing a meaningful and quantifiable basis for its land use fees. EBID offers misguided
9 statements and superficial analysis related to fair market value, but fair market value depends
10 critically on showing the EBID's rights-of-way are scarce in an economic sense. Moreover,
11 EBID's District Engineer states clearly that he knows of no instances in which Qwest's use of a
12 crossing or parallel right-of-way have conflicted with the use of EBID's rights-of-way by
13 another company. Without a limiting standard, such as the costs imposed upon EBID when a
14 network service provider places facilities in its rights-of-way, EBID's land use fees are arbitrary,
15 and the dramatic increases in its fees are an exercise of monopoly power over rights-of-way
16 suitable for placing facilities. As such, increases in EBID's land use fees are neither fair nor
17 reasonable.

18 I declare under penalty of perjury under the laws of the State of New Mexico that the
19 foregoing statements are true and correct to the best of my ability.

20
21 DATED this 21 day of March 2008 at Piedmont, CA.

22
23
24 
25 WILLIAM FITZSIMMONS
26

DECLARATION OF WILLIAM L. FITZSIMMONS - 20
Case No. CV07-163 MV/WDS

Exhibit A

Dr. William Fitzsimmons

352 Olive Avenue
Piedmont, CA 94611

Phone: 510-658-3456
Email: wlfitz@gmail.com

EDUCATION

- Ph.D., Resource Economics, UNIVERSITY OF MASSACHUSETTS, Amherst, MA, 1986
Emphasis: econometrics, natural resource economics, microeconomics, project evaluation, and industrial organization
- M.S., Resource Economics, UNIVERSITY OF MASSACHUSETTS, Amherst, MA, 1981
Emphasis: project evaluation, and economics of forestry
- B.S., Economics, STATE UNIVERSITY OF NEW YORK AT STONY BROOK, NY, 1975

CURRENT POSITION

- Self-Employed Telecommunications Economist, November 2007 – present
- My work as a self-employed telecommunications economist is much the same as it was while I was at LECG.

PROFESSIONAL EXPERIENCE

- LECG, Emeryville, CA, December 1993 – November 2007
Managing Director, Global Telecommunications Practice, July 2000 – November 2007
Principal, January 1998 – June 2000
Senior Managing Economist, January 1997 – December 1997
Managing Economist, December 1993 – December 1996
- Construct financial simulation models for the analysis of telecommunications issues, including interconnection policies and competitive entry into the local exchange
 - Analyze domestic and international telecommunications issues and provide expert witness testimony for regulatory proceedings and litigation
 - Work with telecommunications clients to develop and improve cost models
 - Assess impacts to telecommunications firms and competition from uneconomic or unlawful policies and practices
 - Analyze and estimate costs related to use of the public rights of way by telecommunications firms.
- BELLSOUTH CORPORATION, Atlanta, GA, January 1988 - December 1993
Senior Economist, April 1992 - December 1993
Corporate Economist, January 1988 - April 1992
- Applied the tools of economic, financial and quantitative analysis to the identification and solution of a broad range of business problems, and developed recommendations for use by senior management in making policy decisions

- Key role in building model of the telephone company that interconnects behavioral equations for capital spending, expenses, real revenues, regulation, and a production function
- Based on model output, formulated and presented policy recommendations and contingency plans to meet expected changes in BellSouth's business environment, such as more severe competition, alternative regulation, and investment in multimedia
- Assessment of potential impacts of wireless on traditional wireline and cellular services
- Analyzed corporate level impacts of prospective mergers and acquisitions
- Derived econometric model that is used to create capital spending targets for the Telco and explore network investment options
- Analyzed corporation's advertising and publishing business to assist with derivation of a new pricing strategy
- Estimated the financial impacts of proposed permutations of interstate price caps
- Provided financial modeling analysis for the tender and bid process for international investments

AT&T, Bedminster, New Jersey, June 1986 - January 1988

Market Analysis and Forecasting

- Developed econometric forecasting models for telecommunication services; identified direction and financial implications of customer migration among private line services; wrote principal components regression software; presented technical and theoretical papers and seminars

PAPERS AND REPORTS

"Comments on the Feasibility of the Utopia Project," provided to and the Utah Telecommunications Open Infrastructure Agency and local newspapers in advance of a press conference in Salt Lake City sponsored by Qwest and Comcast, June 8, 2004

"Measuring Competition for Local Services in Ameritech Ohio Using the Diagnostic Method for Assessing Competition," with Lori Lent, invited paper, International Engineering Consortium, *Annual Review of Communications Volume 54*, June 2001

"Competition Report Using the Diagnostic Method for Assessing Competition;" delivered to the Staff of the Public Utilities Commission of Ohio; performed analysis and drafted annual reports with Lori Lent, (January 6, 2000, April 2, 2001, and April 1, 2002, March 31, 2003)

Paper prepared for Telecom New Zealand titled "Review of Network Costing Model Used in Todd Telecommunications Consortium Report," by George Barker, William L. Fitzsimmons, Kieran Murray & Graham Scott dated December 2, 1998

"LECG Financial Simulation Model of Effects of FCC Policies on Large Local Exchange Carriers," by Dr. William Fitzsimmons, Dr. Robert Crandall, Professor Robert G. Harris, and Professor Leonard Waverman, Paper filed with FCC, August 1996

PRESENTATIONS, REGULATORY AND LITIGATION PROCEEDINGS

Expert testimony related to the cost-based pricing requirement for non-recurring costs, February 2008. (Minnesota Public Utilities Commission, PUC Docket No. P-421/AM-06-713 and OAH Docket No. 3-2500-17511-2)

Expert testimony and deposition related to the proper economic interpretation of the Telecommunications Act of 1996 as it applies to fees charged by the Elephant Butte Irrigation District for access to its rights-of-way, July, September, and November 2007, January 2008. (Case No. CV 07-163 MV/WDS)

Expert testimony and cross-examination related to the proper use of cost models to estimate UNE loop prices, May 2007. (Nebraska Public Service Commission, Application No. NUSF-50, Progression No. 3 and Application No. C-3554/PI-112)

Expert report and deposition related to Ameritech Mobile Communications, Inc.'s cost of providing wireless services from 1993 through 1998 in the Cincinnati SMSA, March 2007. (In the Cuyahoga County Court of Common Pleas, Case No. CV 03 517318)

Written testimony and cross-examination related to the proper economic interpretation of cost causation and economic incentives for consideration of intercarrier compensation between Qwest Corporation and Level 3 Communication

Washington, April 2007. (Docket No. UT-063038)

Washington, October 2006. (Docket No. UT-063006)

Oregon, August 2006. (ARB 665),

Minnesota, July 2006. (PUC Docket No. P-421/C-05-721, OAH Docket No. 3-2500-16646-2),

Wyoming, February 2006. (Docket Nos. 70043-TK-05-10, 70000-TK-05-1132, Record No. 9891)

Expert reports and cross-examination related to an assessment of potential financial damages to United Asset Coverage, Inc. from the actions of Avaya, Inc., October – November 2005. (In the United States District Court for the Northern District of Illinois eastern Division, Civil Action No. 05 C 4350)

Written testimony and cross-examination related to price regulation of switched business services in Oregon, October 2005 (Docket No. UX 29)

Expert and reply declarations filed with the FCC in the matter of Special Access Rates for Price Cap Local Exchange Carriers (WC Docket No. 05-25); filed June 13, 2005 and July 29, 2005.

Written testimony submitted in state investigations into the FCC Triennial Review Order's presumptive findings.

Utah, January 2004 (Docket No. 03-999-04),

Minnesota, January 2004 (MPUC Docket No. P-999/CI-03-961, OAH Docket No. 12-2500-15571-2),

Minnesota, December 2003 (MPUC Docket No. P999/CI-03-960, OAH Docket No. 3-2500-15570-2)

Outline of opinions, declaration, and depositions in property tax litigation related to telecommunications competition.

Arizona, April 2007 (Case No. TX 2001-000662)

Montana, June 2007 (Case No. SPT-2006-3),

Iowa, June 2006 (Docket Nos. 06DORFC001 and 04DORFC017),

Phoenix, AZ, January 2002 (Case No. TX 98-00716, 2002)

Declarations and reports in proceedings related to the municipal management of access to public rights-of-way

Portland, OR, February 2006, (Case No. CV 04-1393-PA),

Portland, OR, September 2005, (Case No. CV 04-1393-MO),

Tucson, AZ, July 2003, February 2003, November 2002 (Case No. CIV 01-2500 PHX-PGR, CIV 01-2500 PHX-JAT, 2002-2003),

California, June 2003 (Civil Action No. C-02-2500 MMC),

Berkeley, CA, November 2002, August 2002, January 2001 (Case No. C01-00663 SI, 2001-2002),

Charlotte, VT, November 2002 (Case No. 2:02-CV-261, 2002),

Seattle, WA, June 2002 (Case No. C02-0155P, 2002),

Portland, OR, November 2001 (Case No. 01-CV-1005-JE, 2001), and

Santa Fe, NM, October 2000 (Case No. CIV 00-795, 2000)

Expert written testimony and cross-examination in consolidated cost dockets in 1996-1998 and 2001-2003.

Utah (Docket No. 01-049-85, 2002-2003),

Texas (Docket No. 25188, 2002),

New Mexico (Utility Case No. 3495, 2002),

Minnesota (Docket No. P-421/CI-01-1375 and 12-2500-14490-2, 2002),

Colorado (Docket No. 99A-577T, 2001),

Arizona (Docket No. T-00000A-00-0194, Phase II, 2001),

Utah (Docket No. 94-999-01, Phase III, Part C, 1998),

Minnesota (Docket Nos. P-442, 5321, 3167, 466, 421/CI-96-1540, 1998),

New Mexico (Docket Nos. 96-310-TC and 97-334-TC, 1998),

Iowa (Docket No. RPU-96-9, 1997), and

Arizona (Docket Nos. U-3021-96-448, 1996)

Expert written testimony and cross-examination in arbitration related to unbundled network elements in 2001

Texas (Docket No. 24542, 2001)

Expert written testimony and cross-examination in line sharing price-setting proceedings in 2000-2001.

Iowa (Docket No. RPU-01-6, 2001),
Utah (Docket No. 00-049-105, 2001),
Washington (Docket No. UT-003013, Part A, 2000), and
Minnesota (Docket No. OAH 12-2500-12631-2 and MPUC P-421/CI-99-1665, 2000)

Expert written testimony and cross-examination in broadband and line sharing price-setting proceedings in 2000-2002.

Texas (Docket No. 22469, 2000, 2002),
California (Rulemaking 93-04-003 and Investigation 93-04-002, 2001),
Missouri (Docket No. TO-2001-440, 2001), and
Ohio (Docket No. 96-922-TP-UNC, 2000)

Presentation on "Status and Measurement of Competition," National Association of Regulatory Utility Commissioners (NARUC) Staff Subcommittee on Telecommunications, 2000 Annual Convention, San Diego, California, November 11, 2000.

Ex Parte with the FCC to discuss LECG's analysis of the FCC's Synthesis Model and proposed input values, July 13, 1999

Joint reply affidavit with Debra Aron and Robert G. Harris filed with the FCC in the matter of implementation of the local competition provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98); filed June 10, 1999

Expert affidavit filed with the FCC in the matter of implementation of the local competition provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98); filed May 26, 1999

Expert written testimony and cross-examination in interconnection arbitration proceedings in 1997

South Dakota (Docket No. TC96-184, 1997),
Montana (Docket No. D96.11.200, 1997),
Wyoming (Docket Nos. 72000-TS-96-95 and 70000-TS-96-319, 1997),
New Mexico (Docket No. 96-411-TC, 1997),
North Dakota (Docket No. PU-453-96-497, 1997),
Idaho (Docket Nos. USW-T-96-15 and ATT-T-96-2, 1997), and
Colorado (Docket No. 96S-331T, 1997)

Participated in cost workshops with the Utah Division of Public Utilities and Minnesota Commission in 1996, 1997, and 1998

Expert testimony and cross-examination in universal service proceedings in 1997-1998.

Nebraska (Application No. C-1633, 1998),
Idaho (Case No. GNR-T-97-22, 1998),
Wyoming (General Order No. 81, 1998),

Minnesota (MPUC Docket No. P-999/M-97-909, 1997), and
New Mexico (Docket Nos. 96-310-TC, 97-334-TC, 1997)

Expert declarations in motions for summary judgment in Iowa (June 1997) and Washington
(January 1998)

Presentation on "TELRIC Concepts and Applications," Basics of Regulation Conference, New
Mexico State University Center for Public Utilities and the National Association of Regulatory
Commissioners, Albuquerque, New Mexico, September 18, 1996

ATTACHMENT 2

1
2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEW MEXICO

5 QWEST CORPORATION,

6 Plaintiff,

7 v.

8 ELEPHANT BUTTE IRRIGATION
9 DISTRICT,

10 Defendant.

Case No.CV07-163 MV/WDS

11 **DECLARATION OF MARGARET LYNN NORSWORTHY**
12 **IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

13 I, Margaret Lynn Norsworthy, declare as follows:

14 1. I am the Lead Finance/Business Analyst in the Regulatory Finance Group
15 responsible for the states of New Mexico, Colorado, Utah and Wyoming at Qwest Corporation
16 ("Qwest"). I make this declaration based upon personal knowledge and am competent to testify
17 to the facts set forth herein.

18 2. I have been employed by Qwest Corporation, or its predecessors or affiliates, for
19 20 years. I am actively involved in Qwest finance and policy issues in New Mexico, Colorado,
20 Utah and Wyoming.

21 3. When Qwest initiated legal action against Elephant Butte Irrigation District
22 ("EBID"), I was asked to determine the statewide impact on Qwest if EBID's fee schedule would
23 be applied to municipalities throughout New Mexico.

24 4. A summary of the statewide impact is attached as Exhibit A and is explained
25 below.
26

DECLARATION OF LYNN NORSWORTHY - 1
Case No.CV07-163 MV/WDS

1 5. In preparing this analysis, I reviewed the 2006 ARMIS reports that Qwest
2 provides to the FCC, which details lengths and types of facilities in New Mexico; reviewed the
3 2006 annual report that Qwest provides to the New Mexico Public Regulation Commission;
4 spoke with numerous Network Managers; looked at data on percentage of municipal versus non-
5 municipal facilities; and looked at average lengths of facilities in their respective locations.
6 Based on the above review, I make the following estimations as to the statewide impact if
7 EBID's fee schedule would be applied to municipalities throughout New Mexico.

8 6. Qwest owns 155,065,307 feet of facilities within New Mexico. Sixty-five percent
9 of that is within municipalities, bringing the municipal facility total to 100,792,449 feet. The
10 total number of feet attributed to municipal facilities, reduced by 10 percent when accounting for
11 overlapping facilities within the same rights-of-way, brings the total of municipal facilities to
12 90,713,204 feet.

13 7. Eighty-one percent (73,477,696 feet) of the municipal facilities are parallel rights-
14 of-way. The remaining 19 percent (17,235,509 feet) are crossing rights-of-way. The average
15 crossing length is 60 feet. Dividing Qwest's total number of crossing-feet (17,235,509 feet) by
16 its average per-crossing length (60 feet) results in 287,258 individual crossings.

17 8. EBID's 2007 Fee Schedule can be applied to these numbers. Under the 2007 Fee
18 Schedule, EBID's charge for parallel rights-of-way is \$0.15 per linear foot. Multiplying EBID's
19 fee with my estimated parallel-feet total results in the sum of \$11,021,654. EBID's charge for
20 crossings is \$2,250 for the first 50 feet and \$250 for each additional increment of 50 feet,
21 bringing the total fee per crossing of 60 feet to \$2500.

22 9. To account for the 25-year duration of the permit, the \$2,500 fee can be restated
23 as an annual fee of \$100. Multiplying my total number of crossings (287,258) by this per-year
24 fee of \$100 calculates a total annual cost of \$28,725,848 to Qwest for crossing fees. The
25 combined sum of the parallel and crossing fees is \$39,747,502.

26
DECLARATION OF LYNN NORSWORTHY - 2
Case No.CV07-163 MV/WDS

1 10. Qwest receives a tax benefit of 39.94 percent, which reduces the combined sum of
2 the parallel and crossing fees by \$15,875,152, resulting in a total, after-tax cost to Qwest of
3 \$23,872,350.

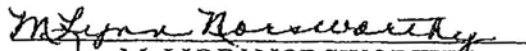
4 11. Qwest's 2006 net income in New Mexico was \$46,080,545. The amount paid in
5 rights-of-way fees in 2006 was \$5,120,335 (\$3,075,273 after taxes). The after-tax cost of
6 \$23,872,350 if EBID's fee schedule was applied throughout the state represents a 776% increase
7 over the current after-tax cost to Qwest for municipal rights-of-way in New Mexico.

8 12. To determine the adverse financial impact on Qwest's annual income, I subtract
9 the estimated rights-of-way costs associated with the EBID fee schedule (\$23,872,350) from
10 Qwest's 2006 annual income, excluding its actual rights-of-way fees (\$49,155,818) and obtain a
11 total of \$25,283,468.

12 13. If the EBID fee schedule were to be applied to all of Qwest's municipal facilities,
13 Qwest's annual income would drop from \$46,080,545 (2006 actual net income) to \$25,283,468.
14 This represents a 45.1 percent decline in income in the first year of the application of the fee
15 schedule. Furthermore, net income for each subsequent year would remain approximately at this
16 new low.

17 I declare under penalty of perjury under the laws of the State of New Mexico that the
18 foregoing statements are true and correct to the best of my ability.

19
20 DATED this 21st day of March 2008 at Denver, Colorado.

21
22
23 
24 M. LYNN NORSWORTHY
25
26

DECLARATION OF LYNN NORSWORTHY - 3
Case No.CV07-163 MV/WDS

Exhibit A

NM EBID Case
Land Use Cost Estimate - Based on EBID Price Schedule
Prepared at Request of Counsel

Formula Description		Amounts
Per ARMIS Report 43-08, December 2006, New Mexico		
Copper	km	41,709
Fiber	km	5,486
Other	km	69
Total	km	47,264
= km * 1,000	1000 meters	47,264,000
= meters * 39.37	39.37 Inches	1,860,783,680
= inches / 12	12 Feet	155,065,307
= feet * % in municipalities	65% In Municipalities	100,792,449
= Municipal Feet * % to eliminate multiple sheaths	10% Eliminate Multiple Sheaths on single route	90,713,204
81% of Feet In Municipalities in parallel RoW	81% in parallel RoW	73,477,696
Amended new formula at \$0.15/foot	0.15	11,021,654
19% of Feet In Municipalities in Crossing RoW	19% in Crossing RoW	17,235,509
Amended new formula at \$2,250 for first 50 feet and \$250 per additional 50 feet or portion thereof (Reduced to annual cost per GAAP)	60 Est crossing in ft	28,725,848
	90 Base price	
	10 Increment price	

Recap of Total Fees	Amended New Formula
In Parallel Rights of Way	11,021,654
In Crossing Rights of Way	28,725,848
Total Expense Before Tax	39,747,502
Tax Benefit (at 39.94%)	15,875,152
Net Income Effect - EBID Price Schedule	(23,872,350)
Qwest New Mexico 2006 Net Income (per Annual Report)	46,080,545
Add back NI effect of booked Right of Way/Franchise charges	3,075,273
Reflect EBID Price Schedule	(23,872,350)
Estimated Net Income using EBID Price Schedule	25,283,468
Percent Change in Net Income	-45.1%

Net Cost Per Customer (statewide)	Franchise	EBID	Change	Percent Change
Pretax Cost	5,120,335	39,747,502	34,627,167	676%
Statewide access lines (12/07)	725,000	725,000	725,000	
Revenue effect per line per month	0.59	4.57	3.98	676%

Effect of Cost on Revenue Available for Other Expenses/Investment	Access Lines	Tariff Price	Share of Tariff Price Committed to Franchise Costs	Share of Tariff Price Committed to Right-of-Way Costs
Residence Customers	477,514	13.50	4.4%	33.8%
Business Customers	247,455	34.37	1.7%	13.3%

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Attorney-Client Privilege
Attorney Work Product
Prepared in anticipation of litigation.

2008-01-04a Sensitivity Anal ACP.xls Exhibit

QC 000693

ATTACHMENT 3

**UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND**

QWEST COMMUNICATIONS
CORPORATION,

Plaintiff,

v.

MARYLAND-NATIONAL CAPITAL
PARK & PLANNING COMMISSION,

Defendant.

Civil Action No. RWT-07-2199

SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF

Qwest Communications Corporation ("Qwest"), by and through its attorneys, Stoel Rives LLP and Drinker Biddle & Reath LLP, files this Second Amended Complaint against the Maryland-National Capital Park & Planning Commission (the "Commission"), alleging as follows:

I. Introduction

1. Qwest is a telecommunications company that provides telecommunications services nationally, internationally and within Maryland. In order to provide these services, Qwest since 2000 has located certain of its telecommunications facilities on 4,435 linear feet of Commission right-of-way property.

2. The Commission makes certain areas of its parkland available for leasing for rights-of-way to utilities such as Qwest and other telecommunications carriers. The Commission regulates the use of its rights-of-way by requiring utilities to enter into license agreements.

3. In negotiations with Qwest for a new license agreement to be effective July 1, 2007, the Commission initially demanded that Qwest pay \$4.20/foot for each of two conduits that Qwest is using. This rental fee does not represent costs caused by Qwest's use of the Commission's rights-of-way, as required by the law in this Circuit. Rather, it is a revenue-raising fee.

SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF - I

4. The impact on Qwest of this initially proposed \$4.20/foot/conduit fee would have been an annual payment of \$37,254 for occupying less than one mile of parkland. Although this annual payment was exorbitant and not based on costs, Qwest nevertheless initially agreed to contract for this amount, under a reservation of rights, due to exigencies described further herein.

5. However, Qwest never was able to contract for this amount. Instead, after Qwest expressed agreement to this amount, the Commission withdrew this demand and, without justification, demanded an annual rental fee of \$26.00/foot/conduit. This 600% increase is not representative of costs caused by Qwest's use of the rights-of-way and, in Qwest's experience, is an unprecedented charge for use of the rights-of-way. The impact on Qwest of this newly proposed fee would be an incredible annual payment of \$230,620 for occupying less than one mile of parkland with two 1.5 inch wide conduits.

6. Qwest refused to enter into a license agreement at this newly demanded \$26.00/foot/conduit charge. The Commission has threatened to eject Qwest from the rights-of-way absent payment of the increased amount. Significantly, while demanding \$26.00/foot/conduit from Qwest, the Commission is charging one of Qwest's competitors \$4.20/foot/conduit.

7. To make matters worse, the Commission during the negotiations demanded that Qwest pay hundreds of thousands of dollars in back license fees as a condition for signing a license agreement. The Commission claims that these fees are compensation for Qwest's use of the rights-of-way before July 1, 2007. Qwest does not owe this money to the Commission, however, because it previously made the payments to other carriers that in turn forwarded the payments to the Commission. Indeed, the Commission has acknowledged that it received the payments, at least in part. Further, the Commission's payment demand is based on \$4.20/foot/conduit. This amount is not based on costs, as required by the law in this Circuit, and Qwest was never obligated to pay this amount for this additional reason. Nevertheless, Qwest

SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF - 2

paid \$294,732.82 under protest as reflective of these back license fees, reserving its right to seek to recover the unlawful fee in this matter.

8. The Commission's unilateral imposition of an exorbitant fee increase, its imposition of non-cost based fees, its discrimination between carriers, and its exercise of unfettered discretion to eject Qwest from the rights-of-way, is in conflict with federal law, including section 253 of the Federal Telecommunications Act of 1996, 47 U.S.C. § 151, *et seq.* (the "FTA").

9. Qwest seeks a declaration of its rights under the FTA that these proposed license agreement provisions are preempted and therefore unlawful.

10. Qwest further seeks a refund of the \$294,732.82 payment that it paid to the Commission under threat of ejection because the Commission has already received at least a part of this payment and, in any event, this payment is not based on the Commission's costs.

II. Parties

11. Qwest is a telecommunications corporation organized and existing under the laws of the state of Delaware, with its principle place of business in Denver, Colorado.

12. Qwest is authorized to do business and provide telecommunications services in Maryland. Qwest provides telecommunications service to residents, businesses, and governmental and quasi-governmental entities nationally, internationally and in the state of Maryland.

13. According to its website, the Commission was created in 1927 by the Maryland General Assembly under the provisions of the Transportation article of the Maryland Code, art. 28 § 1-101 *et. seq.* The Commission is a bi-county agency empowered to acquire, develop, maintain and administer a regional system of parks within Montgomery and Prince George's Counties, and to prepare and administer a general plan for the physical development of the two counties. The Commission administers a park system of more than 52,000 acres, composed of stream valley parks, large regional parks, neighborhood parks and park-school recreation areas.

SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF - 3

14. The Commission's Strategic Plan for Fiscal Years 2007-2009 states that it has a combined work force of approximately 2,000 career employees and 5,000 non-career/seasonal employees, which includes operating police forces. The Commission's net assets at the time of the report exceeded \$583 million.

15. The Commission administers and maintains the park property, including the rights-of-way on the property. The Commission generates revenue by renting, leasing, and/or charging fees for the use of park property to individuals, companies and other entities.

16. One source of revenue comes from telecommunications companies. The Commission has and continues to rent, lease, and/or charge fees for the use of park property for cellular tower placement. The Commission's Proposed FY09 Budget confirms this, stating that "[r]evenues are also received from cell tower agreements with telecommunications companies." The Commission also has and continues to rent, lease, and/or charge fees for the use of the rights-of-way located on park property by wireline telecommunications companies, such as Qwest, which place their facilities in the rights-of-way.

17. On information and belief, the Commission also generates revenue by renting, leasing, and/or charging fees for the use of park property, including the rights-of-way, to non-telecommunications utilities, which place facilities and equipment in and/or on the property.

III. Jurisdiction and Venue

18. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and diversity jurisdiction pursuant to 28 U.S.C. § 1332, as the parties are citizens of different states and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

19. This Court has authority to issue declaratory and other relief pursuant to 28 U.S.C. §§ 2201-02.

20. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), as the defendant is located in this District, the rights-of-way at issue are in this District, and the events giving rise to this action occurred in this District.

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**IV. Historical Use of The Little Falls Parkway Right-of-Way By
American Communication Services and Xspedius Communications**

21. On or about September 22, 1999, American Communication Services of Maryland, Inc. d/b/a e.spire ("ACS") and the Commission entered into a License Agreement for ACS's use of the Commission Right-of-Way (the "ACS License Agreement"). A copy of the ACS License Agreement is attached hereto as Exhibit 1.

22. The ACS License Agreement allowed ACS to install and operate an eight conduit telecommunications system in a stretch of 4,435 feet of Commission right-of-way running alongside Little Falls Parkway (the "Little Falls Parkway Right-of-Way"). Attached as Exhibit 2 is a map showing the location of the Little Falls Parkway Right-of-Way, which is also identified and described within the ACS License Agreement.

23. Each conduit was to contain a single fiber optic cable bundle, installed in accordance with industry standards. The conduits are each approximately a mere 1.5 inches in diameter.

24. The term of the ACS License Agreement was five years, with an option for a five year renewal term, due to expire on September 21, 2004. The annual payment for use of the Little Falls Parkway Right-of-Way was \$3.50/foot for each conduit that contained installed fiber optic cable. Conduit without fiber was not charged.

25. ACS filed for bankruptcy protection in 2002. In connection with its bankruptcy proceeding, ACS transferred all interest in its conduit system, and assigned the ACS License Agreement, to Xspedius Management Co. of Maryland, LLC d/b/a Xspedius Communications ("Xspedius").

26. On March 22, 2004, Xspedius notified the Commission that ACS had transferred its interest in the conduit system and had assigned the ACS License Agreement to Xspedius in connection with the ACS bankruptcy filing. A copy of this letter is attached as Exhibit 3.

27. On or about October 27, 2004, the Commission and Xpedius entered into "Amendment No. 1" to the ACS License Agreement. Under Amendment No. 1, the ACS License Agreement was formally amended to reflect the assignment to Xpedius. In addition, the term was extended to September 21, 2005 and the rate was increased to \$4.20/foot for each conduit. Attached as Exhibit 4 is Amendment No. 1.

V. Qwest's Use of The Little Falls Parkway Right-of-Way

28. On or about June 30, 1999, Qwest and ACS entered into a network construction agreement (the "Qwest-ACS Network Services Agreement"). The agreement contained various rights and obligations regarding ACS's construction of several fiber optic rings throughout the Washington D.C. metropolitan area.

29. As part of the Qwest-ACS Network Services Agreement, Qwest purchased two of eight conduits that ACS planned to construct in the Little Falls Parkway Right-of-Way. After ACS completed construction of the conduit system, Qwest installed a single bundle of fiber optic cable as part of Qwest's general cable installation in the Washington D.C. area.

30. Qwest made license payments to ACS for use of the two conduit in the Little Falls Parkway Right-of-Way, which payments ACS packaged with its own license fees and paid to the Commission. Qwest continued this arrangement with Xpedius after Xpedius assumed the ACS License Agreement.

31. On July 1, 2004, Xpedius notified the Commission that the two conduit had been transferred to Qwest. A copy of this letter is attached as Exhibit 5.

32. On August 3, 2004, the Commission notified Qwest that it would be required to enter into license agreement with the Commission. A copy of this letter is attached as Exhibit 6.

**VI. Request by Qwest Government Services to Use
The Little Falls Parkway Right-of-Way**

33. On January 13, 2004, Qwest Government Services, Inc. ("QGS") acquired from Xspedius two of the six remaining conduit that Xspedius owned. Although QGS is a Qwest affiliate, it is a wholly separate and independent entity from Qwest that provides telecommunications services to the federal government. Copies of sale documents are attached as Exhibit 7.

34. On September 1, 2004, QGS sent a letter to the Commission providing notice of this conveyance. QGS stated that it desired to use the conduit to install fiber optic cable dedicated to a single customer, the U.S. Army. QGS requested permission from the Commission to install this cable. A copy of this letter is attached as Exhibit 8.

35. On September 10, 2004, the Commission denied QGS permission and told QGS to coordinate with Qwest in order to negotiate a license agreement with the Commission. A copy of this letter is attached as Exhibit 9.

VII. Qwest's and QGS's Negotiations with the Commission

36. Qwest and QGS began joint discussions with the Commission for a license agreement in 2005. On July 25, 2005, the Commission sent Qwest, QGS, and Xspedius a draft of a proposed license agreement for each to review. A copy of this draft is attached as Exhibit 10.

37. By February 2006, the Commission, Qwest, and QGS agreed to language for a license agreement for Qwest and QGS. This included a \$4.20 per linear foot fee for use of each conduit in the Commission's rights-of-way.

38. This \$4.20/foot/conduit fee is much higher than the Commission's costs incurred in managing the right-of-way.

39. Nevertheless, Qwest agreed to the rate (subject to a reservation of rights) because its affiliate, QGS, was in urgent need of installing fiber in order to provide service to the U.S.

Army. The Commission would not allow QGSI to install fiber until a license agreement was signed with all Qwest entities.

40. As a further condition for entering into the license agreement, the Commission demanded that Qwest and QGSI pay license fees allegedly owed for use of the Commission right-of-way for earlier periods (the "Disputed Back-License Fees"). The Commission calculated these fees at \$333,849.52. (See letter dated May 11, 2007, and accompanying chart, attached as Exhibit 11).

41. Qwest and QGSI protested this demand. During the time that Qwest had occupied its two conduit, it regularly paid ACS and then Xspedius for this occupancy. ACS and Xspedius added these payments to their own payments due and forwarded these payments to the Commission.

42. The Commission acknowledged duplicate receipt of these payments from Xspedius, at least for a time. In an April 30, 2007 letter from the Commission to Xspedius, the Commission enclosed a chart showing that Xspedius made full payment for four conduit from the period following the assignment from ACS, August 8, 2002 through September 4, 2004. A copy of this letter is attached as Exhibit 12.

43. Upon information and belief, the Commission received and accepted payments from ACS and Xspedius for Qwest's conduit during this time period. Indeed, Qwest recently received supporting documentation attached as Exhibit 14 hereto, showing that on September 23, 2005, the Commission issued an invoice to Xspedius for four conduit. On November 30, 2005, Xspedius sent a corresponding invoice to Fiberlight Communications ("Fiberlight"), which had purchased certain assets from Xspedius including one of the conduit in the Little Falls Parkway Right-of-Way. The invoice was for three of these conduit and specifically acknowledged that two of these three conduit belonged to Qwest. On June 29, 2006, Fiberlight paid Xspedius for these three conduit, including the conduit owned by Qwest.

44. Further, at least \$39,116.70 of the Disputed Back-License Fee amount is attributable to the QGSI conduit, in which the Commission had not allowed QGSI to install fiber. Other license agreements only require license fees to be paid on conduit in which fiber optic cable had been installed.

45. Throughout the second half of 2006, Qwest and QGSI attempted to finalize the license agreement while resolving the Disputed Back-License Fees. The Commission refused to move forward on the license agreement without first receiving payment of the Disputed Back-License Fees. The Commission also threatened to eject Qwest's facilities from the rights-of-way if the Disputed Back-License Fees were not paid.

46. On March 29, 2007, Qwest agreed via email to pay the Disputed Back-License Fees for conduit attributable to Qwest's use only. Qwest agreed to make its payment under a reservation of rights, with the express condition that the parties would move forward with finalizing the license agreement.

47. However, on April 6, 2007, the Commission replied with a new draft license agreement, increasing the fee from \$4.20 to \$26.00 per linear foot for each conduit. A copy of the draft License Agreement is attached hereto as Exhibit 13. This represents an over 600% increase in fees for use of the rights-of-way.

48. The Commission claimed that its increased fee was a result of a valuation of its rights-of-way. Qwest requested documentation of that valuation. The Commission did not provide it.

49. Despite the Commission's bait-and-switch of the annual linear foot fees, Qwest followed through with its promise to pay the Disputed Back-License Fees insofar as they pertained to Qwest's conduits. Qwest refused to pay the amount for QGSI's conduits, since QGSI was never allowed to use them. Accordingly, on or about June 13, 2007, Qwest paid the Commission \$294,732.82 under protest, reserving its rights to seek recovery of the funds.

SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF - 9

50. Despite this payment of the Disputed Back-License Fees, the Commission maintained that Qwest also owed an additional \$39,116.70 for the QGSI conduits. Absent payment of this remaining disputed fee, the Commission throughout July 2007 refused to negotiate and threatened to eject Qwest's facilities from the rights-of-way.

51. The parties scheduled a meeting for August 10, 2007 to discuss the license agreement. In advance of the meeting, Qwest again requested documentation of the valuation of the rights-of-way. The Commission still did not send comments or documentation.

52. On August 2, 2007, the Commission abruptly canceled the scheduled meeting, threatening to begin the eviction process.

53. Consequently, on August 17, 2007, Qwest initiated this lawsuit and filed its original Complaint in this matter.

VIII. Status of Conduit and Fiber Ownership

54. Upon information and belief, the delay in negotiations caused by the Commission's unreasonable demands prohibited QGSI from providing telecommunications services to its customer. Initially, QGSI conveyed one of its two conduit to the Army with the hope that the Army could obtain permission to install cable, but the Commission rejected that request.

55. Consequently, Qwest believes that QGSI and the Army no longer have need for the two conduits. QGSI no longer seeks a license agreement from the Commission. Qwest believes that QGSI obtained an alternative route to serve the U.S. Army locations.

56. Currently, Qwest owns two of the eight conduit within the Commission Right-of-Way. As noted, QGSI and the U.S. Army own two of the other conduit, in which neither party has installed any fiber. On information and belief, Fiberlight owns one of the remaining four conduit, and tw telecom (which later acquired Xspedius) owns at least one of the remaining conduit. Qwest is unsure as to the ownership of the remaining conduit.

57. Qwest's options for building around the Little Falls Parkway are much more limited than QGSI's. Unlike QGSI, Qwest is carrying live traffic on its network, which means Qwest would create greater expense in moving its facilities. Further, Qwest must move its facilities in a manner to re-attach to its fiber optic cable located at the end of the Little Falls Parkway Right-of-Way, which limits Qwest's options in terms of seeking alternate routes.

58. Moreover, there is no certainty that right-of-way from public entities in the area would be charged at anything less than \$26.00/foot/conduit if it is incorrectly perceived by these entities that, based on the Commission's rate schedules, these entities may impose similar charges. Indeed, the surrounding counties in which Qwest would be forced to seek an alternate route are the very counties comprising the Commission's bi-county agency. The ability to relocate facilities around the Commission's property thus is not relevant when determining whether its rates are prohibitive under Section 253.

59. After filing its First Amended Complaint, Qwest learned that the Commission continues to charge at least one other carrier \$4.20/foot/conduit for use of the Little Falls Parkway Right-of-Way. On August 18, 2008, the Commission sent tw telecom an invoice for four of the conduit calculated at \$4.20/foot/conduit, a copy of which is attached hereto as Exhibit 15. Upon information and belief, tw telecom has no current license agreement for use of the Little Falls Parkway Right-of-Way. Yet, the Commission has chosen to charge tw telecom \$4.20/foot/conduit without offering Qwest the same rate. Qwest and tw telecom are competitors.

IX. Claims Against the Commission

First Claim for Relief: Federal Preemption Under 47 U.S.C. § 253

60. Qwest realleges and incorporates herein all preceding paragraphs.

61. Article VI, clause 2, of the U.S. Constitution, commonly known as the Supremacy Clause, provides, in relevant part, that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the

SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF - 11

Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

62. The Commission’s proposed license agreement, including but not limited to the proposed exorbitant revenue-raising fees, its discriminatory impact on Qwest, and the discretion to increase the fees annually, individually and in combination violate section 253(a) of the FTA and are not saved by Section 253(c). The challenged fees go far beyond any costs imposed by Qwest. The Commission’s increase of fees by 600% is a material, indeed unprecedented, increase in right-of-way fees that creates an economic prohibition and barrier to entry under Section 253(a). That the Commission charges Qwest more than its competitor tw telecom (600% more) exacerbates the prohibitory effect.

63. The Commission’s exorbitant and discriminatory fees have the effect of prohibiting Qwest from providing telecommunications services because they dramatically increase the cost of providing such services, rendering the provision of telecommunications services economically infeasible. Qwest uses the fiber optic cable located within these two conduits as part of Qwest’s national fiber optic communications network. The fiber optic cable within these conduits carries voice, data and internet traffic for Qwest customers located throughout the country, including customers located in Maryland. The products offered include fairly technical applications such asynchronous transfer mode (“ATM”), frame relay, dedicated internet access (“DIA”), and virtual private network (“VPN”). Most of these products are used by business customers to transfer data to and from the Internet and between locations.

64. The Commission’s 600% increase in fees would adversely impact Qwest’s profit margins and have the effect of prohibiting Qwest from providing one or more of these services. Qwest normally pays for right-of-way access based on a public entity’s costs, and Qwest almost always pays less than \$5.00 per linear foot regardless of the number of conduit used.

65. If other public entities adopted similar such unprecedented increases in right-of-way fees, Qwest’s profit margins would be substantially reduced and Qwest would be prohibited

SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF - 12

from providing one or more of these services to customers, both in Maryland and nationally. Courts have held that this cumulative effect of similar fees is relevant when considering whether a fee is prohibitory under Section 253. Similarly, courts have held that discriminatory application of right-of-way fees is prohibitory under Section 253.

66. The Commission's proposed license agreement should be declared null and void, as preempted by the FTA under the Supremacy Clause.

Second Claim for Relief: Declaratory Relief

67. Qwest realleges and incorporates herein all preceding paragraphs.

68. An actual controversy exists within the meaning of 28 U.S.C. § 2201 as to whether the aforementioned provisions of the proposed license agreement violates Section 253 of the FTA under the Supremacy Clause, including but not limited to:

- a. Whether the Commission can condition use of its property on payment of non cost-based fees;
- b. Whether per linear foot fees violate Section 253;
- c. Whether the fee demanded in the draft license agreement violates Section 253;
- d. Whether the increase in the fee, from \$4.20 per linear foot to \$26.00 per linear foot, violates Section 253;
- e. Whether the Commission's discriminatory application of its fees – charging Qwest \$26.00 but charging Qwest's competitor \$4.20 – violates Section 253;
- f. Whether the Commission can retain discretion to increase the fees on an annual basis;
- g. Whether the \$4.20 per linear foot fee for back-license fees is unlawful; and
- h. Whether Qwest is entitled to return of the \$294,732.82 in Disputed Back-License Fees, plus interest on that amount.

69. This Court has the power to adjudicate the rights of the parties with respect to this controversy and should grant Qwest declaratory relief under 28 U.S.C. § 2201.

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Third Claim for Relief: Unjust Enrichment

70. Qwest realleges and incorporates herein all preceding paragraphs.

71. Qwest paid the Commission a total of \$294,732.82 in Disputed Back-License Fees under protest and reserving the right to seek recovery of those fees in the event they were later deemed unlawful.

72. Qwest had no obligation to pay the Disputed Back-License Fees. Per linear foot fees are unlawful under federal law and, despite that, Qwest previously paid most or all of the Disputed Back-License Fees to ACS and Xspedius.

73. The Commission demanded payment of these Disputed Back-License Fees as a precondition to any negotiation regarding the draft license agreement.

74. Because of the Commission's actions, Qwest conferred a benefit upon the Commission through the payment of the Disputed Back-License Fees, the Commission had knowledge of and appreciated the benefit, and the Commission's retention of the Disputed Back-License Fees under the circumstances is such that it would be inequitable.

X. Request for Relief

WHEREFORE, Qwest respectfully requests that this Court issue an Order and Judgment:

1. Declaring the aforementioned provisions of the Commission's proposed license, individually and in combination, preempted and therefore unlawful;
2. Awarding Qwest a refund of the \$294,732.82 paid to the Commission in Disputed Back-License Fees, plus prejudgment interest and costs; and
3. Awarding Qwest such other relief as this Court considers just and proper.
4. An Order enjoining the Commission from enforcing the challenged provisions of the proposed license agreement.

Dated: October 6, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2008, I electronically filed the foregoing with the Clerk of the District Court for the District of Maryland, using the CM/ECF system which will send notification of such filing to the following:

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STOEL RIVES LLP

/s/
Thomas W. Snyder

ATTACHMENT 4

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

QWEST COMMUNICATIONS CORP.,

Plaintiff,

v.

MARYLAND-NATIONAL CAPITAL
PARK & PLANNING COMMISSION,

Defendants.

Civil Action No. RWT 07-CV-2199

**PLAINTIFF QWEST COMMUNICATIONS CORP.'S RESPONSES TO DEFENDANT'S
FIRST SET OF INTERROGATORIES**

Qwest Communications Corporation ("Qwest") hereby submits its objections and answers to the First Set of Interrogatories of Defendant Maryland-National Capital Park & Planning Commission (the "Commission") in accordance with Fed. R Civ. P. 33.

GENERAL OBJECTIONS

Qwest raises the following general objections, which are intended to apply to each and every discovery request:

1. Qwest objects to each discovery request to the extent that said discovery request calls for information protected by the attorney-client privilege.
2. Qwest objects to each discovery request to the extent that said discovery request calls for information that constitutes attorney work product.
3. Qwest objects to each discovery request to the extent that said discovery request calls for information protected by court order.
4. Qwest objects to each discovery request to the extent that said discovery request calls for information that constitutes statements, discussions of or offers to settle or compromise deemed irrelevant pursuant to Federal Rule of Evidence 408.

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5. Qwest objects to each discovery request to the extent that said discovery request seeks proprietary business information, trade secrets and documents that are not reasonably calculated to lead to the discovery of admissible evidence.

6. Qwest objects to each discovery request to the extent that such discovery request seeks information that is equally available to the Commission.

7. Qwest objects to each discovery request to the extent they seek legal conclusions or expert opinions.

8. Qwest objects to each discovery request to the extent they are compound.

PRELIMINARY STATEMENT

Qwest has not fully completed investigation of the facts relating to this case, has not fully completed discovery and has not completed its preparation for trial. The responses contained herein are based upon such information and materials that are presently available and specifically known to Qwest. Further discovery, independent investigation, legal research and analysis may supply additional facts, add meaning to known facts as well as establish entirely new factual conclusions and legal contentions, all of which may lead to substantial changes in, and variations from, the supplemental responses set forth herein. Based on the above, Qwest reserves its right to supplement these responses as discovery continues.

Information provided in these responses is made without waiving or intending to waive, but on the contrary preserving and intending to preserve, (a) the right to object on the grounds of competency, privilege, relevance, materiality or any other proper grounds to the use of any information identified or produced for any purpose, in whole or in part, in any subsequent step or proceeding in this action or any other action; (b) the right to object on any and all grounds, at any time, to other discovery procedures involving or relating to the subject matter of the requests to which Qwest has responded herein; and (c) the right at any time to revise, correct, add to or clarify any of the responses proposed herein.

The inadvertent identification or production of any protected or privileged information shall not be deemed a waiver of any applicable protection or privilege with respect to such information.

The fact that Qwest objects to any individual discovery request should not necessarily be taken to signify or imply that information responsive to such discovery request actually exists or ever has existed.

Without waiver of these objections, Qwest responds as follows:

Interrogatory No. 1: Identify each person who assisted you in preparing answers to these interrogatories.

Answer: In addition to counsel, Jack Shives, Manager of Engineering for Qwest and Tricia Garling, Program Manager for Qwest Government Services, Inc. ("QGSI") assisted in preparing answers to these interrogatories.

Interrogatory No. 2: Identify every person that has any knowledge of or information relating to the allegations of your Complaint, and any amendments thereto, and state in full detail the factual information possessed by each person.

Answer: Jack Shives is the primary representative with knowledge and information relating to the allegations of the Second Amended Complaint. Mr. Shives has knowledge concerning Qwest's acquisition of the facilities located in the Little Falls Parkway Right-of-Way, Qwest's payments for use of that right-of-way, Qwest's attempts to negotiate a license agreement with the Commission, the rates Qwest pays for similar rights-of-way, the impact that the Commission's proposed \$26.00/foot/conduit rate would have on Qwest's network operations if that rate were applied to similar rights-of-way, the Commission's refusal to offer a cost-based right-of-way rate, and the costs incurred by Qwest in building around the Little Falls Parkway. Other persons with knowledge and information one or more of these topics, along with a description of this knowledge and information, can be identified in accordance with Fed. R. Civ. P. 33(d) by

reviewing the documents produced in accordance with Plaintiff's Responses to Defendant's First Set of Document Requests.

Interrogatory No. 3: Identify each person, other than a person intended to be called as an expert witness at trial, who has information that tends to support or contradict a position that you have taken or intend to take in this action, including any claim for damages, and state in full detail the factual information possessed by that person.

Answer: Jack Shives has the information described in response to Interrogatory No. 2. Other persons with knowledge and information one or more of these topics, along with a description of this knowledge and information, can be identified in accordance with Fed. R. Civ. P. 33(d) by reviewing the documents produced in accordance with Plaintiff's Responses to Defendant's First Set of Document Requests.

Interrogatory No. 4: Identify each person whom you expect to call as an expert witness at trial, state the subject matter on which the expert is expected to testify, state the substance of the findings and opinions to which the expert is expected to testify and a summary of the grounds for each opinion and identify any written report made by the expert concerning those findings and opinions.

Answer: Qwest does not intend to call an expert witness at trial.

Interrogatory No. 5: If you intend to rely upon any documents or other tangible things to support a position that you have taken or intend to take in the action, including any claim for damages, provide a brief description, by category and location, of all such documents and other tangible things, and identify all persons having possession, custody, or control of them.

Answer: All documents upon which Qwest intends to rely are being produced in response to these Interrogatories or in accordance with Plaintiff's Responses to Defendant's First Set of Document Requests.

Interrogatory No. 6: State with specificity the amount and how you calculate the duplicative payments alleged in the Complaint, and any amendments thereto.

Answer: See attached chart labeled "Duplicate Payment Analysis".

Interrogatory No. 7: State the timeframe when Qwest, Qwest Government Services, or any other Qwest related entity, subsidiary, agent, or contractor thereof first began to access, install or use any telecommunication equipment on the Little Falls Parkway.

Answer: On or about June 30, 1999, Qwest entered into a network construction agreement with American Communication Services of Maryland, Inc. d/b/a e.spire ("ACS"). As part of that agreement, Qwest purchased two of eight conduits that ACS planned to construct in the Little Falls Parkway Right-of-Way. On or about September 22, 1999, ACS and the Commission entered into a License Agreement for ACS's use of the Commission Right-of-Way. The ACS License Agreement allowed ACS to install and operate an eight conduit telecommunications system in the Little Falls Parkway Right-of-Way.

After ACS completed construction of the conduit system, Qwest in approximately March 2000 installed a single bundle of fiber optic cable as part of Qwest's general cable installation in the Washington D.C. area. The cable bundle weaved between two conduits as it traversed the Little Falls Parkway Right-of-Way.

ACS filed for bankruptcy protection in 2002. In connection with its bankruptcy proceeding, ACS transferred all interest in its conduit system, and assigned the ACS License Agreement, to Xspedius Management Co. of Maryland, LLC d/b/a Xspedius Communications ("Xspedius").

On January 13, 2004, QGSI acquired from Xspedius one of the six remaining conduit that Xpedius owned. QGSI acquired a second conduit on January 26, 2005. (QGSI is a wholly separate and independent entity from Qwest that provides telecommunications services to the federal government.) At that time, QGSI already maintained one fiber cable within a conduit that it had installed, along with a handhole, in a small elbow section of the Little Falls Parkway Right-of-Way on July 15, 2001, which totaled approximately 100 feet. QGSI did not know at the time of the installation that this was Commission property.

On September 1, 2004, QGSI sent a letter to the Commission providing notice of this conduit conveyance and requesting permission to install fiber optic cable in the conduit that

would be dedicated to a single customer, the U.S. Army. On September 10, 2004, the Commission denied QGSI permission and told QGSI to coordinate with Qwest in order to negotiate a license agreement with the Commission.

Throughout 2005 and 2006, Qwest and QGSI engaged in discussions concerning a license agreement from the Commission. The Commission would not allow Qwest and QGSI to enter into a license agreement until, among other things, Qwest and QGSI paid the Commission large sums for past use of the Little Falls Parkway Right-of-Way, which Qwest and QGSI disputed was owed. The Commission additionally would not allow QGSI to install fiber in the right-of-way in order to serve the Army. QGSI conveyed its two conduits to the Army with the hope that the Army could obtain permission to install cable, but the Commission rejected that request.

When Qwest and QGSI agreed to pay the disputed sums in March 2007, the Commission raised the demanded fee for use of the right-of-way from \$4.20/foot/conduit to \$26.00/foot/conduit. Qwest and QGSI refused to pay this outlandish amount. Ultimately, QGSI abandoned its request to use the Little Falls Parkway Right-of-Way. QGSI took steps to remove its fiber from the 100 foot elbow section in approximately September 2008. On or about March 31, 2009, Qwest took steps to remove its fiber from the conduits in the Little Falls Parkway Right-of-Way in connection with a fiber build-around organized by Fiberlight.

At the current time, QCC and QGSI believe that they generally have removed all active fiber from the Little Falls Parkway Right-of-Way. QCC and QGSI understand that there may be an issue as to whether fiber cable may remain on a very small area of land managed by the Commission along River Road. QCC and QGSI are investigating whether and to the extent that any such fiber cable remains on this small area of Commission property. QCC and QGSI will promptly supplement their response to this interrogatory when this issue is resolved and provide documents identifying their fiber location.

Interrogatory No. 8: State the number of conduits on the Little Falls Parkway accessed or used by Qwest, Qwest Government Services, or any other Qwest related entity, subsidiary, agent, or contractor thereof, and the timeframe of usage for each conduit.

Answer: As explained in response to Interrogatory No. 7, Qwest accessed two of the conduits through use of a single fiber cable that weaved between the two conduits as it traversed the right-of-way. QGSI never accessed the conduits that traveled along the right-of-way, aside from the 100 feet of a single conduit described in response to Interrogatory No. 7.

Interrogatory No. 9: State the total linear feet of fiber optic cable or other telecommunication cable on the Little Falls Parkway accessed, installed or used by Qwest, Qwest Government Services, or any other Qwest related entity, subsidiary, agent, or contractor thereof

Answer: Qwest understands that the Commission has measured the length of the Little Falls Parkway Right-of-Way at 4,435 feet (after originally measuring it at 4,335 feet). Qwest has not independently verified either of these numbers. As explained in response to Interrogatory No. 7, Qwest installed a single fiber cable along the length of the right-of-way, weaving between two conduits. QGSI never occupied its two conduits running the length of the right-of-way. However, QGSI installed approximately 100 feet of conduit and a handhole in the Little Falls Parkway Right-of-Way on or about July 15, 2001 which was relocated in September 2008.

Interrogatory No. 10: State the timeframe and number of conduits added, constructed or installed on the Little Falls Parkway by Qwest, Qwest Government Services, or any other Qwest related entity, subsidiary, agent, or contractor thereof.

Answer: As explained in response to Interrogatory No. 7, QGSI installed approximately 100 feet of conduit and a handhole in the Little Falls Parkway Right-of-Way on or about July 15, 2001 which was relocated in September 2008.

Interrogatory No. 11: State the timeframe and number of vaults added, constructed or installed on the Little Falls Parkway by Qwest, Qwest Government Services, or any other Qwest related entity, subsidiary, agent, or contractor thereof.

Answer: As explained in response to Interrogatory No. 7, QGSI installed approximately 100 feet of conduit and a handhole in the Little Falls Parkway Right-of-Way on or about July 15, 2001 which was relocated in September 2008.

Interrogatory No. 12: State the total sums paid by Qwest, Qwest Government Services, or any other Qwest related entity, subsidiary, agent, or contractor thereof to any other telecommunication providers, or other entities, to enter on and make use of the Little Falls Parkway.

Answer: See attached chart labeled "Duplicate Payment Analysis".

Interrogatory No. 13: For the sums identified above, please itemize any and all payments including the date of the payment, the payment rate, to whom the payment was tendered, and the time period covered by the payment.

Answer: See attached chart labeled "Duplicate Payment Analysis".

Interrogatory No. 14: Identify all other equipment, facilities, or property maintained by Qwest, Qwest Government Services, or any other Qwest related entity, subsidiary, agent, or contractor thereof, on Commission property other than the Little Falls Parkway.

Answer: None to Qwest's knowledge.

Interrogatory No. 15: Please state whether Qwest, Qwest Government Services, or any other Qwest related entity, subsidiary, agent, or contractor thereof, agreed to and paid another other entity, including the Commission, the rate of \$4.20 per linear foot per conduit per annum, or more, for access or utilization of the Little Falls Parkway.

Answer: Yes. Qwest and Qwest Government Services each agreed on March 29, 2007 to pay the Commission the rate of \$4.20 per linear foot per conduit per annum. The Commission then withdrew its assent. Before that, Qwest had paid other carriers as indicated on the attached chart labeled "Duplicate Payment Analysis".

Interrogatory No. 16: Identify all persons who have given written or recorded statements concerning the subject matter of this action, state the date of each such statement, identify the person taking the statement, and identify its present custodian.

Answer: Qwest is unaware of any such statements.

Interrogatory No. 17: Identify and provide a copy of all statements made by the Commission, and/or any of its officers, agents, representatives and employees consistent with FRCP 26(b)(3)(c).

Answer: Any statements that the Commission has made concerning this case are contained within the documents produced in accordance with Plaintiff's Responses to Defendant's First Set of Document Requests.

DATED: September 4, 2009



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Attorneys for Plaintiff

VERIFICATION

STATE OF COLORADO)
) ss.
COUNTY OF ARAPAHOE)

Jack Shives, being first sworn, on oath deposes and says:

That Jack Shives is the Manager of Engineering of Qwest Communications Company, LLC f/k/a Qwest Communications Corporation ("Qwest"), the plaintiff in the above cause of action; that I have read the foregoing First Set of Interrogatories and the answers thereto, know the contents thereof, and, as they concern Qwest, believe the answers to the First Set of Interrogatories to be true and accurate.

Jack Shives

SUBSCRIBED AND SWORN TO before me this 4th day of September, 2009.

Signature: Harold V. Eason

Name (Print): Harold V. Eason



NOTARY PUBLIC in and for the State
of Colorado, residing at Broomfield, CO
My appointment expires: March 27, 2013

VERIFICATION

STATE OF VIRGINIA)
) ss.
COUNTY OF FAIRFAX)

Tricia Garling, being first sworn, on oath deposes and says:

That Tricia Garling is the Program Manager of Qwest Government Services, Inc. ("QGS"); that I have read the foregoing First Set of Interrogatories and the answers thereto, know the contents thereof, and, as they concern QGS, believe the answers to the First Set of Interrogatories to be true and accurate.



SUBSCRIBED AND SWORN TO before me this 4th day of SEPTEMBER, 2009.

Signature: Floyd Mc Kinney

Name (Print): FLOYD MC KINNEY

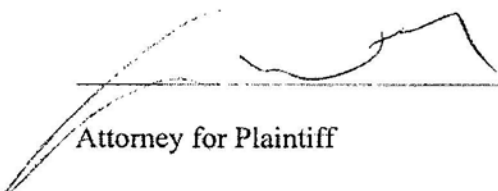
NOTARY PUBLIC in and for the State
of VIRGINIA, residing at FAIRFAX County
My appointment expires: MAY 31, 2013

Reg # 340995

STATEMENT OF ATTORNEY

The undersigned hereby states that he is the attorney for the party answering the above propounded First Set of Interrogatories and that all objections, if any, set forth in response to said First Set of Interrogatories were made by the undersigned as required by Civil Rule 33.

DATED this 4th day of September, 2009.



Attorney for Plaintiff

Duplicate Payment Analysis
Qwest v. Maryland Parks
Prepared July 31, 2009

Payment Period	Payments from Others	Payments from Qwest as Backpayment (Based on 5/11/07 Commission Chart)*	Canceled Checks Showing Qwest Payments, If Available	Overpayments
9/22/99 – 9/21/00	\$34,553.54 Representing 3 ducts at \$3.50, prorated for date of entry Paid by e.spire Made in 2 installments: 1 – \$11,550 on 12/16/99 (MNC1912-18) 2 – \$23,003.54 on 6/7/01 (twr0090-92)	\$18,398.07 Representing 2 ducts at \$4.20 (\$4.20 x 2 x 4,435, divided by 365 and times 120 days) = \$12,452.54 + \$5,945.53 interest (Qwest actually was charged for period 3/1/00-6/30/00) Paid by Qwest as part of \$294,732.82 check dated 6/13/07 (MNC1947-50)		Commission was paid for 3 ducts, which were the only three in use and thus included the two Qwest ducts. Qwest is entitled to refund of amount paid for this period for its 2 ducts - \$18,398.07 .
9/22/00 – 9/21/01	\$26,381.26 Paid by e.spire on 8/2/01 (MNC1925-1928) (unclear for how many ducts, or how calculation was performed)	\$52,420.12 Representing 2 ducts at \$4.20 (\$4.20 x 2 x 4,435) = \$37,254 + \$15,166.12 interest Paid by Qwest as part of \$294,732.82 check dated 6/13/07 (MNC1947-50)		None shown at this time.
9/22/01 – 9/21/02	No current information	\$49,923.92 Representing 2 ducts at \$4.20 (\$4.20 x 2 x 4,435) = \$37,254 + \$12,669.92 interest Paid by Qwest as part of \$294,732.82 check dated 6/13/07 (MNC1947-50)		None shown at this time, except for the 1 month period below
8/8/02 – 9/21/02	\$7,654.50 Representing 4 ducts (\$3.50 x 4 x 4,435 feet, divided by 365 and times 45 days) Paid in 2 installments: 1 – \$7,482.15 pd by Xspedius by check dated 5/4/04 for \$128,862.15 (FL00141-147) (MNC1929-33)		\$3,741.08 Representing 2 ducts at \$3.50 (\$3.50 x 2 x 4,335, divided by 365 times 45 days) Qwest paid Xspedius	This is a segregated period that is related to Xspedius' assumption of e.spire agreement in bankruptcy; Qwest paid its share at \$3.50 for this one month period.

Duplicate Payment Analysis
Qwest v. Maryland Parks
Prepared July 31, 2009

Payment Period	Payments from Others	Payments from Qwest as Backpayment (Based on 5/11/07 Commission Chart)*	Canceled Checks Showing Qwest Payments, If Available	Overpayments
	2 – \$172.35 pd by tw telecom as part of its \$88,459.15 backpayment (tw0031-40) (backpayment made in 2 installments; \$21,329.70 check on 8/14/07 (tw0028-30) (MNC1951) and \$67,129.45 check on 9/11/07) (tw005) (MNC1955-57))		for two years plus this month by check dated 6/3/04 in amount of \$64,431.08 (FL00141-47, part. 141 and 145)	
9/22/02 – 9/21/03	\$62,090.00 Representing 4 ducts (\$3.50 x 4 x 4,435 feet) Paid in 2 installments: 1 – \$60,690.00 pd by Xspedius by check dated 5/4/04 for \$128,862.15 (FL00141-147) 2 – \$1,400 pd by tw telecom as part of its \$88,459.15 backpayment (tw0031-40) (backpayment made in 2 installments; \$21,329.70 check on 8/14/07 (tw0028-30) (MNC1951) and \$67,129.45 check on 9/11/07) (tw005, 0025-27) (MNC1955-57))	\$47,546.59 Representing 2 ducts at \$4.20 (\$4.20 x 2 x 4,435) = \$37,254 + \$10,292.59 interest Paid by Qwest as part of \$294,732.82 check dated 6/13/07 (MNC1947-50)	\$30,345.00 Representing 2 ducts at \$3.50 (\$3.50 x 2 x 4,335) Qwest paid Xspedius for two years plus one month by check dated 6/3/04 in amount of \$64,431.08 (FL00141-47, part. 141 and 145)	Qwest is entitled to recovery of full overpayment amount of \$47,546.59 .
9/22/03 – 9/21/04	\$62,090.00 Representing 4 ducts (\$3.50 x 4 x 4,435 feet) Paid in 2 installments: 1 – \$60,690.00 pd by Xspedius by check dated 5/4/04 for \$128,862.15 (FL00141-147) (tw0087-89) 2 – \$1,400 pd by tw telecom as part of its \$88,459.15 backpayment (tw0031-40) (backpayment made in 2 installments; \$21,329.70 check on 8/14/07 (tw0028-30) (MNC1951) and \$67,129.45 check on	\$45,282.47 Representing 2 ducts at \$4.20 (\$4.20 x 2 x 4,435) = \$37,254 + \$8,028.47 interest Paid by Qwest as part of \$294,732.82 check dated 6/13/07 (MNC1947-50)	\$30,345.00 Representing 2 ducts at \$3.50 (\$3.50 x 2 x 4,335) Qwest paid Xspedius for two years plus one month by check dated 6/3/04 in amount of \$64,431.08 (FL00141-47, part. 141 and 145)	Qwest is entitled to recovery of full overpayment amount of \$45,282.47 .

Duplicate Payment Analysis
Qwest v. Maryland Parks
Prepared July 31, 2009

Payment Period	Payments from Others	Payments from Qwest as Backpayment (Based on 5/11/07 Commission Chart)*	Canceled Checks Showing Qwest Payments, If Available	Overpayments
	9/11/07) (tw005, 0025-27) (MNC1955-57))			
9/22/04 – 9/21/05	\$81,958.80 Representing 4 ducts and late fee $(\$4.20 \times 4 \times 4,435 \text{ feet}) = \$74,508 + \$7,450.80 \text{ late fee}$ Paid in 3 installments: 1 – \$72,828.00 by Xspedius on 10/29/04 (FL0007, 31-40, 155) (MNC1934-36) 2 – \$7,282.80 by Xspedius on 11/24/04 (tw0068) (MNC1937-41) 3 – \$1,848.00 pd by tw telecom as part of its \$88,459.15 backpayment (tw0031-40) (backpayment made in 2 installments; \$21,329.70 check on 8/14/07 (tw0028-30) (MNC1951) and \$67,129.45 check on 9/11/07) (tw005, 0025-27) (MNC1955-57))	\$972.41 Representing 2 ducts at \$4.20 $(\$4.20 \times 2 \times 4,435) = \$37,254 - \$36,414 \text{ credit} + \132.41 interest Paid by Qwest as part of \$294,732.82 check dated 6/13/07 (MNC1947-50)	\$36,414.00 (CREDITED) Qwest check dated 2/14/05 (FL0148-55), which Commission deemed to be for period 7/1/04-6/30/05	Qwest was credited its payment.
9/22/05 – 9/21/06	\$74,508.00 Representing 4 ducts $(\$4.20 \times 4 \times 4,435 \text{ feet})$ Paid in 2 installments: 1 – \$72,828.00 pd 10/14/05 by Xspedius (FL007, 31-40) (MNC1942-46) 2 – \$1,680.00 pd by tw telecom as part of its \$88,459.15 backpayment (tw0031-40) (backpayment made in 2 installments; \$21,329.70 check on 8/14/07 (tw0028-30) (MNC1951) and \$67,129.45 check on 9/11/07) (tw005, 0025-27) (MNC1955-57))	\$41,072.54 Representing 2 ducts at \$4.20 $(\$4.20 \times 2 \times 4,435) = \$37,254 + \$3,818.54 \text{ interest}$ Paid by Qwest as part of \$294,732.82 check dated 6/13/07 (MNC1947-50)	\$36,414.00 Qwest check dated 12/20/05 (FL0156-58)	Qwest is entitled to recovery of full overpayment amount of \$41,072.54 .

Duplicate Payment Analysis
Qwest v. Maryland Parks
Prepared July 31, 2009

Payment Period	Payments from Others	Payments from Qwest as Backpayment (Based on 5/11/07 Commission Chart)*	Canceled Checks Showing Qwest Payments, If Available	Overpayments
9/22/06 -- 9/21/07	\$81,958.80 Representing 4 ducts and late fee (\$4.20 x 4 x 4,435 feet) = \$74,508 + \$7,450.80 late fee Paid by tw telecom as part of its \$88,459.15 backpayment (tw0031-40) (backpayment made in 2 installments; \$21,329.70 check on 8/14/07 (tw0028-30) (MNC1951) and \$67,129.45 check on 9/11/07 (tw005, 0025-27) (MNC1955-57))	\$39,116.70 Representing 2 ducts at \$4.20 (\$4.20 x 2 x 4,435) = \$37,254 + \$1,862.70 interest Paid by Qwest as part of \$294,732.82 check dated 6/13/07 (MNC1947-50)		Commission was double-paid for this period. Qwest is entitled to recovery of full overpayment amount of \$39,116.70.
9/22/07 -- 9/21/08	\$18,627 Representing 1 duct Paid by Xspedius on 11/4/08 (tw0005, 20-22) (MNC1958-59) \$18,627 Representing 1 duct Paid by Xspedius on 3/6/09 -- apparently for Fiberlight (FL0041-42) (tw0002-4)			None at this time.
9/22/08 -- 9/21/09	No current information			None at this time.

* = denotes that Commission chart calculates Qwest obligation on a July 1-June 30 cycle

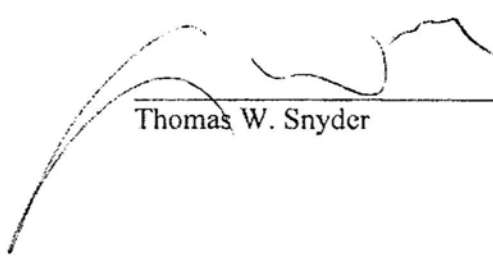
Duplicate Payment Analysis
Qwest v. Maryland Parks
Prepared July 31, 2009

SUMMARY	
Period:	Double Payments:
9/22/99-9/21/00	\$18,398.07
9/22/02-9/21/03	\$47,546.59
9/22/03-9/21/04	\$45,282.47
9/22/05-9/21/06	\$41,072.54
9/22/06-9/21/07	\$39,116.70
Total:	\$191,416.37

CERTIFICATE OF SERVICE

I certify that I served the foregoing Plaintiff's Response to Defendant's First Set of Interrogatories by electronic and first-class mail this 4th day of September, 2009, upon:

Jared McCarthy, Esq.
MNCPPC Office of General Counsel
6611 Kenilworth Avenue, Suite 403
Riverdale, Maryland 20737
Jared.mccarthy@mncppc.org



Thomas W. Snyder

ATTACHMENT 5



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

QWEST CORPORATION,
a Colorado corporation,

Plaintiff,

v.

No. CIV 00-795 LH

THE CITY OF
SANTA FE, NEW MEXICO,

Defendant.

DECLARATION OF DR. WILLIAM L. FITZSIMMONS

1. I am the Managing Director, Global Telecommunications Practice at LECG, LLC, an economic consulting firm. I have a Ph.D. in Resource Economics from the University of Massachusetts at Amherst. I have more than a dozen years of experience analyzing telecommunications issues. While at LECG, I have developed financial simulation models of competitive entry into local services, advised telecommunications companies on the construction of forward-looking cost models, assessed the impact to telecommunications firms and competition from uneconomic or unlawful policies and practices, and analyzed and estimated costs related to the use of the public rights-of-way by telecommunications firms. With respect to rights-of-way usage and costs, I am familiar with the rights-of-way management costs of, and the fees imposed by, a number of municipalities in Qwest Corporation's service area. I have testified in over twenty regulatory proceedings on cost models and economic policy issues. Before I joined

LECG, I served as an economist at BellSouth Corporation in Atlanta, Georgia. My curriculum vitae is attached as Attachment A.

2. I make this declaration to explain how the costs that the Santa Fe Telecommunications Ordinance ("the Ordinance") seeks to impose on facilities-based, wireline telecommunications firms doing business in Santa Fe ("the City") lack any causal relationship with the actual costs that Santa Fe will incur as a result of managing its rights-of-way ("ROW") in connection with the provision of telecommunications services in the City. I also explain that the terms of the Ordinance are not competitively neutral and describe how the costs will fall disproportionately on Qwest, as the incumbent local exchange carrier and carrier of last resort, with substantial telecommunications facilities already installed on the City's ROW.

3. I have reviewed and am familiar with the Ordinance and with the provisions of the Santa Fe City Code relating to excavations, street cuts, and restoration referred to therein. *See Santa Fe City Code, §§ 23-2, et seq; §§ 27-1, et seq.*

4. According to my review of municipal ROW policies, cities typically incur two types of ROW management costs. The first includes management costs resulting from activities such as issuing permits, reviewing traffic control plans, inspecting construction sites, and updating city maps of utility facilities in the rights-of-way. The costs incurred by cities for this type of ROW management are based on (1) the time required by city employees to perform each function, (2) the hourly wage plus benefits paid these employees and (3) an overhead factor to cover such costs as vehicles for inspectors, office space, phones and section or department management. The second type of ROW management cost that may be incurred by cities includes the cost of remediating any

additional pavement degradation that is caused by cutting the street to place telecommunications facilities.

5. The lease payment required by the Ordinance does not reflect either of these kinds of costs and is certainly not *limited* to reimbursing the City for such amounts. Because the Ordinance's lease payments would be determined based on the fair market rental value of the "leasable property," they would not depend on the amount of the City's costs, and there is no reason to believe that they would bear *any* relationship to those costs except by happenstance. I also note that the Ordinance does not define the meaning of "fair market rental value." Indeed, it is far from clear how the fair market rental value of a ROW in or below a City street could be appraised. Real estate appraisal is typically based on the following three methodologies: (a) the sales comparison approach, i.e., the value indicated by recent sales of comparable properties in the market; (b) the cost approach, i.e., the current cost of reproducing or replacing the improvements, minus the loss in value from depreciation, plus site value; and (c) the income capitalization approach, i.e., the value of a property's earning power based on the capitalization of its income. See, e.g., Appraisal Institute, *The Appraisal of Real Estate*, 81 (11th ed. 1996). None of these methodologies for measuring the market value of property is designed to measure the actual costs incurred by the City in managing its rights-of-way.

6. Moreover, other provisions of the Ordinance (or elsewhere in the Santa Fe Code) already appear to be designed to recover at least some of the direct costs for managing the ROW. The City charges permit fees for street cuts, compaction test fees, and imposes restoration penalties for work involving street cuts in its ROW. These fees are of the kind typically used by municipalities to recover their one-time costs relating to permit

review, traffic control, inspections, mapping and remediation of pavement degradation. The lease fee, on the other hand, is designed to generate municipal revenue on an ongoing basis from the placement of telecommunications facilities in the ROW. This fee is not designed to recover costs incurred by the City.

7. I understand that the City proposed a lease calling for an annual rental fee of \$6,000 from Qwest to install a single fiber cabinet on the City's right-of-way on Bishop's Lodge Road. I understand that it was for an above-ground cabinet measuring 4 feet by 4 feet sitting on a 12 foot by 18 foot concrete pad. While installation of this facility would result in some one-time costs for the City associated with activities such as permit reviews and inspections, there should be no ongoing costs that would warrant an ongoing lease fee. Based on my review of ROW management costs in several cities in Qwest's service area, I believe that the \$6,000 lease fee would far exceed actual costs incurred by Santa Fe.

8. Similarly, the Santa Fe Ordinance's requirement that telecommunications carriers construct excess conduit would impose additional costs on carriers that use the City's rights-of-way. In essence, the Ordinance would require firms to adopt a "build capacity and they will come" business strategy without any assurance, or even reasonable expectation on many routes, that other firms will ever want to use this capacity. The levels of financial losses that a firm will experience by adhering to this requirement are not related to the costs that it causes by using the City's rights-of-way.

9. To the extent that the lease payments (and the costs to the carrier of constructing excess conduit and dedicating the conduit to the City) exceed the direct costs of managing the ROW, these charges create economic inefficiencies by distorting

investment decisions of telecommunications providers. Instead of basing investment decisions on normal business factors, such as anticipated revenues from and costs caused by providing services, telecommunications providers would need to take into consideration the additional – and unpredictable – costs assessed by the City for use of the ROW.

10. In addition, two elements of the Ordinance are not competitively neutral. First, lease payments on existing facilities are after-the-fact charges for facilities that Qwest placed over many decades when it was a highly regulated service provider in Santa Fe. A substantial portion of the lease costs that the Santa Fe Ordinance forces upon Qwest is a result of the fact that Qwest is already using the rights-of-way to provide service. These costs are *not* incurred as a result of a current business decision by Qwest, but decisions made by the company in the past in order to fulfill its ongoing obligation to provide service in a timely manner and to provide service to all customers in its service areas. Imposing an after-the-fact lease cost on facilities already in place will cause Qwest to incur substantial costs associated with its prior deployment of telecommunications facilities. As the biggest and oldest carrier in Santa Fe, Qwest will be at a significant cost disadvantage compared to new entrants currently planning to develop networks in the City. This differential burden would undermine rational business decisions, based on actual and predictable costs, that otherwise would lead to the appropriate use of resources.

11. The second element of the Ordinance that is not competitively neutral involves the requirement that telecommunications providers install excess conduit capacity for future use by other telecommunications carriers. Forcing firms to install, at their own

expense, twice as much capacity as they require, with no assurance of recovering this cost, is highly discriminatory. The first telecommunications provider that installs conduit within a given segment of ROW will bear the cost of building excess capacity, with no assurance that it will be reimbursed. Other carriers may never use the excess capacity in that right-of-way. Future competitors seeking to use conduit in the right-of-way will be able to purchase capacity only as needed, avoiding the financial risk of installing excess capacity. This is competitively biased against firms currently installing facilities.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 26th day of October 2000.


Dr. William L. Fitzsimmons



WILLIAM L. FITZSIMMONS

LECG
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Emeryville, CA 94608

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EDUCATION

Ph.D., Resource Economics, University of Massachusetts, Amherst, MA, 1986

Emphasis: econometrics, natural resource economics, microeconomics, project evaluation, and industrial organization

M.S., Resource Economics, University of Massachusetts, Amherst, MA, 1981

Emphasis: project evaluation, and economics of forestry

B.S., Economics, State University of New York at Stony Brook, NY, 1975

PRESENT POSITION

LECG, Emeryville, CA, December 1993 – present

Managing Director, Global Telecom Practice, July 2000 – present

Principal, January 1998 – June 2000

Senior Managing Economist, January 1997 – December 1997

Managing Economist, December 1993 – December 1996

- Construct financial simulation models for the analysis of telecommunications issues, including interconnection policies and competitive entry into the local exchange
- Analyze domestic and international telecommunications issues and provide expert witness testimony for regulatory proceedings and litigation
- Work with telecommunications clients to develop and improve cost models
- Assess impacts to telecommunications firms and competition from uneconomic or unlawful policies and practices
- Analyze and estimate costs related to use of the public rights of way by telecommunications firms

PROFESSIONAL EXPERIENCE

BellSouth Corporation, Atlanta, GA, January 1988 - December 1993

Senior Economist, April 1992 - December 1993

Corporate Economist, January 1988 - April 1992

- Applied the tools of economic, financial and quantitative analysis to the identification and solution of a broad range of business problems, and developed recommendations for use by senior management in making policy decisions

- Key role in building model of the telephone company that interconnects behavioral equations for capital spending, expenses, real revenues, regulation, and a production function
- Based on model output, formulated and presented policy recommendations and contingency plans to meet expected changes in BellSouth's business environment, such as more severe competition, alternative regulation, and investment in multimedia
- Assessment of potential impacts of wireless on traditional wireline and cellular services
- Analyzed corporate level impacts of prospective mergers and acquisitions
- Derived econometric model that is used to create capital spending targets for the Telco and explore network investment options
- Analyzed corporation's advertising and publishing business to assist with derivation of a new pricing strategy
- Estimated the financial impacts of proposed permutations of interstate price caps
- Provided financial modeling analysis for the tender and bid process for international investments

AT&T, Bedminster, New Jersey, June 1986 - January 1988

Market Analysis and Forecasting

- Developed econometric forecasting models for telecommunication services; identified direction and financial implications of customer migration among private line services; wrote principal components regression software; presented technical and theoretical papers and seminars

PAPERS FILED WITH REGULATORY AGENCIES

"Competition Report Using the Diagnostic Method for Assessing Competition;" delivered to the Staff of the Public Utilities Commission of Ohio; performed analysis and drafted report with Lori Lent on behalf of Ameritech Ohio, January 6, 2000.

Paper prepared for Telecom New Zealand titled "Review of Network Costing Model Used in Todd Telecommunications Consortium Report," by George Barker, William L. Fitzsimmons, Kieran Murray & Graham Scott dated December 2, 1998

"LECG Financial Simulation Model of Effects of FCC Policies on Large Local Exchange Carriers," by Dr. William Fitzsimmons, Dr. Robert Crandall, Professor Robert G. Harris, and Professor Leonard Waverman, Paper filed with FCC, August 1996

PRESENTATIONS AND REGULATORY PROCEEDINGS

Expert written testimony and cross-examination on behalf of U S WEST in line sharing price setting proceedings in 2000.

Minnesota (Docket No. OAH 12-2500-12631-2 and MPUC P-421/CI-99-1665)

Washington (Docket No. UT-003013, Part A)

Ex Parte with the FCC on behalf of Ameritech to discuss LECG's analysis of the FCC's Synthesis Model and proposed input values, July 13, 1999.

Joint reply affidavit with Debra Aron and Robert G. Harris on behalf of Ameritech filed with the FCC in the matter of implementation of the local competition provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98); filed June 10, 1999

Expert affidavit on behalf of Ameritech filed with the FCC in the matter of implementation of the local competition provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98); filed May 26, 1999

Expert written testimony and cross-examination on behalf of U S WEST in interconnection arbitration proceedings in 1997

South Dakota (Docket No. TC96-184),

Montana (Docket No. D96.11.200),

Wyoming (Docket Nos. 72000-TS-96-95 and 70000-TS-96-319),

New Mexico (Docket No. 96-411-TC),

North Dakota (Docket No. PU-453-96-497),

Idaho (Docket Nos. USW-T-96-15 and ATT-T-96-2), and

Colorado (Docket No. 96S-331T)

Participated in cost workshops on behalf of U S WEST with the Utah Division of Public Utilities and Minnesota Commission in 1996, 1997, and 1998

Expert written testimony and cross-examination on behalf of U S WEST in consolidated cost dockets in

Arizona (Docket Nos. U-3021-96-448, 1996),

Iowa (Docket No. RPU-96-9, 1997),

New Mexico (Docket Nos. 96-310-TC and 97-334-TC, 1998),

Minnesota (Docket Nos. P-442, 5321, 3167, 466, 421/CI-96-1540, 1998), and

Utah (Docket No. 94-999-01, Phase III, Part C, 1998)

Expert testimony and cross-examination in universal service proceedings on behalf of U S WEST in 1997 and 1998

New Mexico (Docket Nos. 96-310-TC, 97-334-TC),

Minnesota (MPUC Docket No. P-999/M-97-909),

Wyoming (General Order No. 81),

Idaho (Case No. GNR-T-97-22), and

Nebraska (Application No. C-1633)

Expert declarations in support of motions for summary judgment by U S WEST in Iowa (June 1997) and Washington (January 1998)

Presentation on "TELRIC Concepts and Applications," Basics of Regulation Conference, New Mexico State University Center for Public Utilities and the National Association of Regulatory Commissioners, Albuquerque, New Mexico, September 18, 1996

August 2000

00117

ATTACHMENT 6

STATE OF NEW MEXICO

CITY OF DEMING

IN THE MUNICIPAL COURT
CITY OF DEMING, NEW MEXICO

CITY OF DEMING, NEW MEXICO,)
Plaintiff,)

v.)

QWEST COMMUNICATIONS)
INTERNATIONAL, INC.,)
Defendant.)

No. 200700861
Date Filed: _____

RECEIVED
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BY: MT.

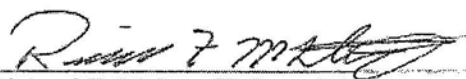
CRIMINAL COMPLAINT

CRIME: Violation of the DEMING CITY CODE, Title 8, Chapter 5, Section 1-B

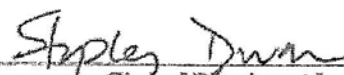
The undersigned complains upon information and belief and says that:

1. On or about the 12th day of November 1991, the City of Deming duly passed, adopted, and approved Ordinance No. 841, titled "An Ordinance Granting Certain Rights and Privileges to the Mountain States Telephone and Telegraph Company, Its Successors and Assigns", effective on or about the 12th day of December 1991;
2. Said Ordinance No. 841, by its terms, was operative for ten years;
3. On or about the 1st day of August 2003, and continuing until the present, in the City of Deming, State of New Mexico, the above-named defendant, a successor company to the Mountain States Telephone and Telegraph Company, did refuse and continues to refuse to renegotiate its expired franchise ordinance, City of Deming Ordinance No. 841; and
4. Said defendant continues to operate within the city limits of the City of Deming without a current franchise ordinance in place and such violates Section 8-5-1B of the DEMING CITY CODE, with each day of said operation being a separate violation as provided in Section 8-5-2 of the DEMING CITY CODE.

I swear or affirm under penalty of perjury that the facts set forth are true to the best of my information and belief.


Richard F. McInturff, Complainant
Administrator, City of Deming, New Mexico

Attest:


Treasurer, City of Deming, New Mexico

**IN THE MUNICIPAL COURT IN AND FOR THE CITY OF DEMING
COUNTY OF LUNA, STATE OF NEW MEXICO**

Before the Honorable Frank M. Van Gundy, Municipal Court Judge

CITY OF DEMING
Plaintiff

vs.

QWEST COMMUNICATIONS INTEL
123 E. MARCY ST.
SANTA FE NM 87501

SUMMONS

DOB:
SS# 000-00-0000
Case No. 200700861
Defendant

YOU ARE HEREBY NOTIFIED that a complaint has been filed in this Court charging that you committed the following offense(s):

MISC VIOLATIONS- VIOLATION OF THE DEMING CITY CODE, TITLE 8, CHAPTER 5, SEC
COURT COSTS

You are ordered to appear before the undersigned on JULY 13, 2007 at 2:00 P.M. in the Municipal Court to plead to these charges.

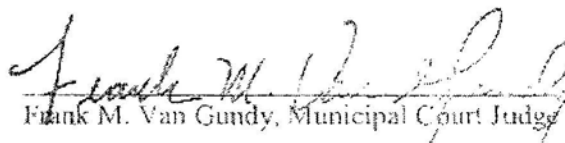
The Court is located at:

309 SOUTH GOLD
DEMING NM 88030

If you fail to appear at the time and place specified, a warrant will be issued for your arrest.

Summons shall be served in person.

Dated: 07/03/2007


Frank M. Van Gundy, Municipal Court Judge

ATTACHMENT 7

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
LEVEL 3 COMMUNICATIONS, LLC)	
)	Docket No. 09-153
Petition for Declaratory Ruling that Certain)	
Right-of-Way Rents Imposed by the New)	
York State Thruway Authority Are)	
Preempted Under Section 253)	

DECLARATION OF GALE R. PERKO

I, Gale R. Perko, declare as follows:

1. I am the Director of Network Planning, Network Services for Qwest Corporation ("Qwest"). I have been employed by Qwest for 39 years. I am responsible for broadband deployment in Arizona, New Mexico, Colorado, Utah, Nebraska, Iowa, Minnesota, North Dakota, South Dakota, Wyoming, Montana, Idaho, Oregon and Washington. My business address is 700 W. Mineral Avenue, Littleton, Colorado 80120. I make this declaration based upon personal knowledge and am competent to testify to the facts set forth herein.

2. Qwest provides telecommunications services, including broadband, throughout the United States, including Arizona. Qwest's provision of these services to local governments, cities and their residents is consistent with the direction of the Federal Telecommunications Act and the FCC's recent Broadband Initiative.

3. Qwest requires access to state and local rights-of-way throughout the country in order to provide broadband services to its customers. In recent years, Qwest has seen a dramatic increase in excessive right-of-way fee demands by local governments, which, on several occasions, have impeded the deployment and provision of broadband services.

4. In December 2007, for example, Qwest was told that, due to city layoffs, the city of Mesa, Arizona was implementing a new permit structure and increasing its permit fees. Up until this time, Qwest was paying approximately \$100 for a permit. The city increased the permit fee to \$510 per sheet or per page of each application. Each job for Qwest typically requires three sheets per application. Thus, the new fee increased Qwest's average permit costs from \$100 to \$1,530 per permit.

5. The city of Mesa stated that the new turn-around time for issuing permits would be 12 days. Qwest often needs permits on a much quicker basis. Part of the city's new pricing structure included increased fees for faster turn-around times. Under this schedule, Qwest must pay \$1,030 per sheet for a turn-around time of 6 days and \$1,545 for a turn-around time of 3 days. Since a typical job requires three sheets, Qwest was thus forced to pay \$4,635 for a single permit with a three day turn-around time to deploy broadband facilities to a single client.

6. Approximately 6 months later, in June 2008, the City again notified Qwest that it was increasing its fees to \$710 per sheet, effective July 1, 2008. The city also adds a 4 percent Technology Fee to every permit. Qwest's average permit fee now exceeds \$2,130 per permit.

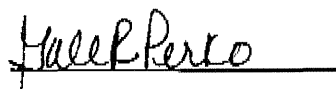
7. In less than two years, permit fees in the city of Mesa have increased from \$100 to in excess of \$2,130 for an average permit, with a turn-around time of 12 days. The cost is greater for fees with a faster turn-around time. As a result, Qwest's permit costs alone have increased from \$9,597.31 in 2007 to \$627,849.60 in 2008.

8. There is no rational relationship between Qwest's use of the city's rights-of-way and the city's new permit fees, and the city has not provided us with any studies suggesting such a relationship. Mesa's new fee structure has impeded the deployment of broadband services in

the city, and continues to do so. Funds which were formally expended to deploy broadband are now being expended on these excessive fees.

I declare under penalty of perjury under the laws of the State of Colorado that the foregoing statements are true and correct to the best of my ability.

DATED this 15th day of October 2009 at Littleton, Colorado.

A handwritten signature in black ink, appearing to read "Gale R. Perko", is written over a horizontal line.

Gale R. Perko

ATTACHMENT 8

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 08 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TIME WARNER TELECOM OF
OREGON, LLC, an Oregon limited
liability company,

Plaintiff,

and

QWEST COMMUNICATIONS
CORPORATION, a Delaware corporation
QWEST CORPORATION, a Colorado
corporation,

Plaintiffs - Appellants,

v.

CITY OF PORTLAND, an Oregon
municipal corporation,

Defendant - Appellee.

No. 06-36023

D.C. Nos. CV-04-01393-PA
CV-05-01386-PA

MEMORANDUM^{*}

TIME WARNER TELECOM OF
OREGON, LLC, an Oregon limited
liability company,

No. 06-36024

D.C. Nos. CV-04-01393-PA
CV-05-01386-PA

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Plaintiff - Appellant,

and

QWEST COMMUNICATIONS
CORPORATION, a Delaware corporation
QWEST CORPORATION, a Colorado
corporation,

Plaintiffs,

v.

CITY OF PORTLAND, an Oregon
municipal corporation,

Defendant - Appellee.

TIME WARNER TELECOM OF
OREGON, LLC, an Oregon limited
liability company; QWEST
COMMUNICATIONS CORPORATION,
a Delaware corporation; QWEST
CORPORATION, a Colorado corporation,

Plaintiffs - Cross/Appellees,

v.

CITY OF PORTLAND, an Oregon
municipal corporation,

Defendant - Cross/Appellant.

No. 06-36061

D.C. Nos. CV-04-01393-PA
CV-05-01386-PA

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, District Judge, Presiding

Argued and Submitted February 4, 2009
Portland, Oregon

Before: PAEZ and RAWLINSON, Circuit Judges, and JENKINS^{**}, District Judge.

As clarified at oral argument, Qwest Communications Corporation (Qwest) appeals the district court's judgment in favor of the City of Portland (the City) on Qwest's challenge to the franchise fees based on per-foot usage, and the "in-kind" provisions of its franchise agreement.

Time Warner Telecom of Oregon, LLC (TWT) appeals the district court's judgment in favor of the City on TWT's challenge to the five percent gross revenue fee included in its franchise agreement, and the district court's determination that the services provided by TWT were included within the agreement's definition of "telecommunication services."

The City cross-appeals the district court's determination that TWT's "in-kind" requirement violated the Telecommunications Act.

^{**} The Honorable Bruce S. Jenkins, Senior U.S. District Judge for the District of Utah, sitting by designation.

1. The in-kind requirements that Qwest challenges, which were provided to the City twelve years ago, do not vest the City with broad discretion, and they do not have the effect of prohibiting the provision of telecommunications services, as demonstrated by Qwest's continued operation. *See Sprint Telephony PCS, LP v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc) (setting the standard for whether a requirement violates the Telecommunications Act).

Therefore, these requirements do not violate § 253(a) of the Telecommunications Act.

2. Similarly, because the annual fees imposed on Qwest, calculated on per-foot usage, do not have the effect of prohibiting Qwest from providing telecommunications services, they do not violate § 253(a).

3. The five percent gross revenue fees imposed on TWT by the City were taxes within the meaning of the Tax Injunction Act. *See Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 (9th Cir. 2006) (describing factors to consider in determining whether a fee constitutes a tax). Therefore, we agree with the district court that the Tax Injunction Act deprived it of jurisdiction to review the specific provisions of the telecommunications franchise agreements. *See id.*

4. The district court committed no error when it decided that the information services provided by TWT fell within the broad definition of “telecommunications system” in the franchise agreement. *See Bernard v. First Nat’l Bank of Oregon*, 550 P.2d 1203, 1210 (Or. 1976) (holding that under Oregon law, contract terms are presumed to have been used “in their primary and general acceptance” absent evidence to the contrary).

5. Ruling without the benefit of *Sprint*, the district court erred in determining that TWT’s in-kind requirements violated § 253 of the Federal Telecommunications Act. Under the standard adopted in *Sprint*, these requirements did not have the effect of prohibiting the provision of telecommunications services.

AFFIRMED IN PART AND REVERSED IN PART. EACH PARTY SHALL BEAR ITS COSTS ON APPEAL.